pd-0907-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 1/22/2018 2:54 PM
Accepted 1/24/2018 10:34 AM
DEANA WILLIAMSON
CLERK

ORAL ARGUMENT GRANTED.

Case No.: PD-0907-17

FILED
COURT OF CRIMINAL APPEALS
1/25/2018
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS

OF TEXAS

CHRISTOPHER ERNEST BRAUGHTON, JR.
Appellant

v.

THE STATE OF TEXAS,
Appellee.

Decided in the 228th Judicial District Court of Harris County, Texas
Trial Court Cause Number: 1389139, The Honorable Marc Carter, Presiding;
Appealed to the First Court of Appeals, Cause No. 01-15-00393-CR.

CHRISTOPHER ERNEST BRAUGHTON, JR.'S OPENING BRIEF

Niles Illich
SBOT: 24069969
The Law Office of Niles Illich, Ph.D., J.D.
701 Commerce, Suite 400
Dallas, Texas 75202
Telephone: (972) 802−1788
Facsimile: (972) 236−0088
Email: Niles@appealstx.com

ATTORNEY FOR
APPELLANT CHRISTOPHER
ERNEST BRAUGHTON, JR.

1. IDENTITY OF PARTIES, COUNSEL, JUDGES, AND JUSTICES

Pursuant to Rule 38.1 of the Texas Rules of Appellate Procedure, Appellant provides this Court with this complete list of all interested parties.

Appellate Court: FIRST COURT OF APPEALS

Appellate Panel: Justice Evelyn Keyes (dissenting)
Justice Harvey Brown (authoring)
Justice Rebeca Huddle (resigned)

Justice Terry Jennings[1] (dissenting from the denial of motion for *en banc* reconsideration)

Trial Court: 228TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY

Trial Court Judge: The Honorable Marc Carter

Appellant: CHRISTOPHER ERNEST BRAUGHTON, JR.

Trial Attorneys: Mark Sandoval
M.T. Sandoval and Associates
P.O. Box 1187
Houston, Texas 77251

The Hon. Patrick Shelton
5 Buttonbush Ct.
Spring, Texas 77380

Appellate Counsel: Niles Illich
LAW OFFICE OF NILES ILLICH, PH.D., J.D.
701 Commerce, Suite 400
Dallas, Texas 75202
Direct: (972) 802−1788
Email: Niles@appealstx.com

[1] Justice Evelyn Keyes also dissented from the denial of the motion for *en banc* reconsideration.

Robert Sirianni, Jr. (Motion for New Trial only)
201 N. New York Ave.
Suite 200
Winter Park, Florida 32789

Appellee: THE STATE OF TEXAS

Trial and Appellate Counsel:

Kim Ogg
Devon Anderson
Alan Curry
Aaron Chapman
Melissa Stryker
Assistant District Attorneys
Harris County District Attorney's Office
1201 Franklin Street, Suite 600
Houston, Texas 77002-1923

Amicus Curiae: THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.

Appellate Counsel:

David H. Thompson
John D. Ohlendorf
Haley N. Proctor
COOPER & KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, D.C. 20036

Brady Wyatt
THE LAW OFFICE OF BRADY WYATT, III
3300 Oak Lawn Ave., Suite 600
Dallas, Texas 75219

Amicus Curiae: TEXAS STATE RIFLE ASSOCIATION

Appellate Counsel:

Sean P. Healy
THE LAW OFFICE OF SEAN HEALY
113 E. Houston Street
Tyler, Texas 75502-8130

State Prosecuting Attorney:

Appellate Counsel:

Stacey M. Soule
State Prosecuting Attorney
Office of the State Prosecuting Attorney
209 W. 14th Street
Austin, Texas 78701
information@spa.texas.gov

2. CITATION TO THE RECORD

I. Citation to Majority and Dissenting Opinions

The First Court of Appeals withdrew its first opinion in response to Appellant's first motion for reconsideration. The re-issued opinion did not change the disposition of the case and Justice Keyes remained in dissent. The Southwest Reporter, however, did not include the text of Justice Keyes' dissent with the re-issued opinion. Accordingly, counsel is unable to cite to the dissent without citing either to the withdrawn opinion or to the slip opinion. In light of this problem, counsel has elected to cite to the slip opinion for both the majority and the dissent. The slip opinion for the majority is dated April 20, 2017 and the slip opinion for the dissent is dated December 29, 2016. Each of these is included in the appendix attached to this opinion.

II. Citation to the Record

The reporter's record is cited to as: [10 RR 23] meaning volume 10, page 23. The clerk's record is cited to as: [CR 23] meaning page 23.

3. STATEMENT REGARDING ORAL ARGUMENT

This Court has granted oral argument. *Braughton v. State*, PD-0907-17, 2017 Tex. Crim. App. LEXIS 1243, * 1 (Tex. Crim. App., Dec. 6, 2017) (granting petition for discretionary review on all grounds and granting oral argument).

4. TABLE OF CONTENTS

5. TABLE OF AUTHORITIES

Cases

Statutes

PD-0907-17

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

CHRISTOPHER ERNEST BRAUGHTON, JR.
Appellant

v.

THE STATE OF TEXAS,
Appellee.

To the Honorable Judges of the Court of Criminal Appeals:

Christopher Ernest Braughton, Jr., Appellant, respectfully presents this opening brief.

6. STATEMENT OF THE CASE AND STATEMENT OF PROCEDURAL HISTORY

On July 26, 2013, the State indicted Christopher Braughton, Jr. (hereinafter "Braughton") for murder.[2] [CR 18]. Braughton pleaded not guilty and his trial began on February 2, 2015. [2 RR 1; 3 RR 15]. Nine days after trial began, a jury found Braughton guilty. [9 RR 24]. On February 11, 2015, the jury sentenced Braughton to spend twenty years in the custody of the Texas Department of Criminal

[2] TEX. PENAL CODE §19.02.

Justice. [9 RR 90; CR 212]. Braughton filed a motion for new trial, which the trial court denied.

Braughton timely filed his notice of appeal. [CR 286].

The trial court clerk assigned the case to the First Court of Appeals. On December 29, 2017, the intermediate-appellate court issued its first-published opinion. *Braughton v. State*, No. 01-15-00393-CR, 2016 Tex. App. LEXIS 13802, at *2 (App.—Houston [1st Dist.] Dec. 29, 2016) (designated for publication) (op. withdrawn) (Keyes, J., dissenting).

Justice Evelyn Keyes dissented. [Dissent, 1]. Justice Keyes argued that the evidence conclusively established that Braughton acted in self-defense and/or defense of others when he shot the complaining witness and therefore the verdict should be vacated and the intermediate-appellate court should render a judgment of acquittal.

On January 9, 2017, Appellant filed a motion for rehearing and the intermediate-appellate court invited the State to respond. On April 20, 2017, the intermediate-appellate court withdrew its original opinion and issued a new-published opinion. *Braughton v. State*, 522 S.W.3d 714 (Tex. App.—Houston [1st Dist.] Apr. 20, 2017, pet. granted) (designated for publication) (Keyes, J., dissenting). In this opinion, the intermediate-appellate court again affirmed the judgment but this time concluded that any error in failing to issue the requested

lesser-included offense was harmless. *Id*. at *45-57. Justice Keyes remained in dissent. *Id*. at *57.

Appellant filed a motion for further rehearing, the intermediate-appellate court invited the State to respond, but the court denied the motion.

Appellant then filed a motion for *en banc* reconsideration and the intermediate-appellate court instructed the State to respond. On July 20, 2017, the full court denied *en banc* reconsideration. Justice Terry Jennings and Justice Keyes dissented from the denial of the motion for *en banc* reconsideration.

Having exhausted his options in the intermediate-appellate court, Appellant filed his petition for discretionary review on August 22, 2017. This Court granted the petition, on all grounds, on December 6, 2017. Rule 70.1 of the Texas Rules of Appellate Procedure required the petitioner to file his brief within 30 days after this Court grants review. This Court, however, granted Appellant's motion for additional time to file his opening brief, and, accordingly, Appellant's brief is due on Monday, January 22, 2018.

7. ISSUES PRESENTED

***First Ground for Review*:**

What is the standard of review for evaluating a claim of legally insufficient evidence on the State's non-evidentiary burden of persuasion in a claim of self-defense/defense of others? Specifically, how should an intermediate-appellate court weigh the evidence to determine whether the State met its non-evidentiary burden of persuasion?

***Second Ground for Review*:**

Whether the intermediate-appellate court erred when it determined that the State met its non-evidentiary burden of persuasion and that Appellant was unjustified in acting in self-defense/defense of others?

***Third Ground for Review*:**

Whether the trial court's erroneous decision not to issue a requested-lesser-included offense was harmless as the intermediate-appellate court concluded in its re-issued opinion?

8. STATEMENT OF FACTS

The first time that Braughton and the complaining witness met, Braughton was coming out of his home, aware that his parents had been chased and were frightened, it was night, and the complaining witness was beating Braughton's father's face. After Braughton directed the accoster, the complaining witness, to stop assaulting his father, Braughton fired one shot; that shot killed the complaining witness.

A. May 23, 2013

On May 23, 2013, Emmanuel Dominguez (hereinafter, "Dominguez") was 27-years-old and Braughton was 21-years-old. [7 RR 72]. Before this day, Braughton and Dominguez had never met; within moments of their only meeting, Braughton shot and killed Dominguez. [7 RR 77–78].

On May 23, 2013, Dominguez lived with his girlfriend, Jessica Cavender. [5 RR 10; 14; 15]. On that day/night, Cavender and Dominguez went "out on [Dominguez's motorcycle] and [got] something to eat and just relax[ed]." [5 RR 17–18; 37]. Sometime that afternoon/evening they went to a parade of restaurants, bars, and icehouses where they drank alcohol, performed karaoke, and Dominguez got drunk. [5 RR 18–20; 39–48]. While they were at a karaoke bar, Dominguez, who was intoxicated, quarreled with Cavender. [5 RR 20–21]. Cavender recognized that Dominguez was intoxicated and refused to get on his motorcycle with him—

Dominguez departed on his motorcycle and abandoned Cavender, his live-in-girlfriend, at an unfamiliar bar with people whom she had just met. [3 RR 110; 5 RR 21–23; 51].

On May 23, 2013, Christopher Braughton lived with his parents, worked for his parents' company, and attended community college. [7 RR 72–73]. Braughton's family went to dinner at a Salt Grass restaurant but Braughton remained at home. [6 RR 142; 7 RR 74–75].

B. Driving Home

Around 10:00 pm, after dinner, Braughton Sr., his wife, and their thirteen-year-old son left the Salt Grass restaurant. [6 RR 21]. They got into Melissa Braughton's car (Braughton's mother and Braughton Sr.'s wife) and Braughton Sr. began to drive his family home. [6 RR 21; 22–23]. As Braughton Sr. approached the family home, he noticed "a big bright light in the back of the vehicle" and heard "a really loud revving sound." [6 RR 144]. Then the vehicle's warning sensors activated indicating that an object was very close to the rear bumper. [6 RR 144–45; 7 RR 25]. Braughton Sr. identified the object behind him as a motorcycle and recognized that the car's warning signal meant that this motorcycle was within a foot of his bumper. [6 RR 145]. Just before Braughton Sr. and his family turned onto their street, Melissa, in a panic, called Braughton and exclaimed emphatically, "Son, this guy is chasing us. We are right by the house." [6 RR 149; 7 RR 25; 26]. Melissa

testified that she was scared for her youngest son who was in the back seat of her car. [7 RR 25].

C. Braughton Meets Dominguez

Braughton Sr. stopped the car in front of his home and Dominguez, the man operating the motorcycle, "f[ell] off [of] the bike and r[an] to[ward Melissa's] car,..." [6 RR 188; 6 RR 90]. Braughton Sr. got out of Melissa's vehicle and Dominguez approached him, started yelling vulgarities, and began punching Braughton Sr. in the face. [6 RR 189; 7 RR 28]. According to Glen Irving, a neighbor, Braughton Sr. opened the car door and got out "and then the guy who was riding the motorcycle started punching and beating up the person that had gotten out of the car." [6 RR 92]. Braughton Sr. told his wife to call 9-1-1. [6 RR 189; 193–94]. Melissa "jumped out of the car," believing that Dominguez was going to kill her and her family. [7 RR 28]. Braughton opened the front door to his parents' house and saw "Dominguez . . . attacking [his] dad, just punching him in the face." [7 RR 77]. Melissa and her thirteen-year-old son ran past Braughton, who was then moving toward his father who was being beaten by Dominguez, and into their home. [6 RR 195; 7 RR 29].

The first time that Braughton ever encountered Dominguez, Dominguez was punching Braughton Sr. in the face. [7 RR 78]. Braughton Sr., while still being hit, told Braughton to go back into the house and he heard Braughton say, "Stop, I have a gun." [4 RR 23; 6 RR 195; 7 RR 96]. Irving heard Braughton make this warning

twice. [6 RR 93]. Braughton repeated this warning two or three times while holding the gun "in the air." [7 RR 79–80]. After Braughton issued his warnings, Dominguez forced Braughton Sr. to the street; then Dominguez, who was then six to seven feet from Braughton, turned toward Braughton and yelled, "Oh, you got a gun, motherf****r. I got a gun for your ass." [6 RR 93; 117–18; 196; 197–98; 7 RR 30; 81; 98]. For the first time, Braughton pointed the gun toward Dominguez. [7 RR 98]. Braughton Sr. believed that Dominguez had a gun. [6 RR 200; 7 RR 9; 10]. Dominguez opened a box attached to the side of his motorcycle and, as he was raising his arm from the side of the motorcycle, Braughton "pointed [the gun] towards [Dominguez's] arm," while not "aiming at a specific area on him," and pulled the trigger. [6 RR 202–03; 7 RR 84; 102–03; 109]. Braughton shot only one time but killed Dominguez. [3 RR 173; 5 RR 71; 7 RR 84]. Braughton testified that Dominguez never turned his back to him. [6 RR 100].

Melissa called 9-1-1, handed the phone to Braughton Sr. who pleaded with the operator to dispatch emergency personnel, and Melissa began to administer CPR to Dominguez; Robert Bannon, a neighbor, assisted Melissa. [7 RR 31; 32]. When Dominguez died, his body contained .17 grams of alcohol per deciliter of blood. [5 RR 76; 6 RR 50; 52].

Braughton testified that he only shot Dominguez to defend himself and his family. [7 RR 86].

D. The Police Arrive

After shooting Dominguez, Braughton waited outside on a curb for the police and, when they arrived, he identified himself as the person who had shot Dominguez. [3 RR 37–38]. When Detective A. Alanis, of the Harris County Sherriff's Department's homicide unit, arrived, Dominguez's motorcycle lay on its side and it was still running. [3 RR 68; 120]. The police searched the saddlebags of Dominguez's motorcycle but did not find a firearm. [3 RR 106].

E. Trial

The attorney for the State called several police officers and then called Bannon, an Army veteran. [4 RR 11; 36]. Bannon lived on the same street as the Braughton family and Dominguez. [4 RR 11]. Immediately prior to the shooting, Bannon was sitting outside of his parents' home. [4 RR 12]. Bannon heard the screeching of tires and looked up to see a motorcycle that was a foot or two from the bumper of Melissa's moving car. [4 RR 15]. Bannon testified that Braughton Sr. stopped his car and got out and started yelling at "the guy on the motorcycle." [4 RR 16]. The two men stood in the street and yelled at each other. [4 RR 18]. Bannon never saw a fight, but he saw Braughton come out of his house with a gun in his hand—but with the gun raised in the air—and then heard him yell, "I have a gun." [4 RR 22; 56]. Although he never saw a fight, Bannon recognized that a fight was imminent. [4 RR 22–23; 56]. Bannon testified that he heard Braughton Sr. tell

Braughton to go back inside of the house. [4 RR 23; 67]. Bannon then testified that he went inside of his house to get his rifle. [4 RR 24]. Bannon went upstairs, retrieved his rifle, came back downstairs, recognized that he had neglected to put the bolt into the gun, went back upstairs, got the bolt, put it into the rifle, and then started back downstairs. [4 RR 25–26]. As Bannon walked out of his front door he saw a man, whose identity Bannon did not know, on the ground; Bannon never heard the gunshot. [4 RR 26–27]. Bannon helped with CPR and then got into his car to help the police locate the scene. [4 RR 33].

The attorney for the State also called "Gina."[3] [4 RR 76]. In May 2013, Gina was a junior in high school. [4 RR 77]. Gina lived across the street from the Braughtons. On May 24, 2013 she was alone in her bedroom and she heard shouting and arguing outside, but the shouting was too indistinct for her to discern meaning. [4 RR 81; 82]. Gina got out of bed and looked out of her window, which, even at night, was covered by a solar screen that blocked out 90 percent of visible light and rendered everything "blurry." [3 RR 164; 4 RR 90; 112; 125]. Gina was 90 feet from the conflict. [3 RR 164; 4 RR 90; 112].

[3] Because Gina was a minor when she testified, the Court of Appeals elected to use the pseudonym "Gina." The dissent adopted this for the purposes of convenience and, in this brief, Braughton will also use the pseudonym.

During trial, Gina distinguished between the people she saw only by the color of the shirt that she believed that they wore on the night of the shooting. In the interest of clarity, Gina's terms have not been replicated here. She testified that Dominguez was in a red shirt and Braughton in a black shirt. [4 RR 108]. Gina referred to Braughton Sr. as "the orange shirt."

In spite of the distance, the dark of night, and the solar screen, Gina testified that she saw Dominguez and Braughton Sr. fight. [4 RR 105]. Gina also testified that she saw Braughton walk "from the direction of [his] home" with a gun in his hand and then she heard a man and a woman tell Braughton to put the gun down. [4 RR 91–92]. Gina testified that Dominguez put his hands up and slowly started to back away without ever reaching toward the saddlebags on his motorcycle. [4 RR 94]. Gina testified that she heard the gunshot, stating, "I was looking out the window, and then the guy in black [Braughton] had his arm out, and that's when I heard the shooting." [4 RR 97]. Gina then testified that she heard Melissa say to Braughton, "What did you do?" [4 RR 98]. Gina alerted her parents who, perplexingly, dismissed her claim and directed her to go back to bed. [4 RR 129]. Gina went to sleep but a police officer who rang her family's doorbell around 2:00 am woke her. [4 RR 86].

On cross-examination, Gina conceded that she never saw a gun and that she could not distinguish faces because they were "blurry." [4 RR 112–13]. She also clarified that she did not see a fight but that she assumes that a fight occurred because the people on the street were "yelling at each other." [4 RR 114]. Gina testified that it was dark outside and that she never saw Bannon. [4 RR 118].

Gina testified that everything that she told to the police on the night of the shooting was true and correct; and she testified that on the night that she spoke with

the police that she told the police that Dominguez fought Appellant rather than Braughton Sr. and that during this fight, which did not occur, that Appellant pulled out a gun and shot Dominguez. [4 RR 114-15].

DNA evidence from the State's witness established that the DNA samples taken from Dominguez's knuckles likely came from Dominguez and Braughton Sr. [6 RR 25].

The jurors deliberated for six hours on February 10, 2015. [8 RR 89]. The following day, after additional deliberation, the jury found Braughton guilty. [9 RR 9].

F. Motion for New Trial

Braughton filed a motion for new trial that claimed that his trial counsel was constitutionally ineffective for failing to serve their expert with a subpoena and to get this expert to testify during trial. The trial court denied the motion.

G. Appeal and Petition for Discretionary Review

Braughton asked the First Court of Appeals to review his case and the Court issued one opinion, withdrew that opinion, issued a new opinion, and denied *en banc* reconsideration over two dissenting justices. Justice Evelyn Keyes dissented from both opinions. This Court granted Braughton's petition for discretionary review on December 6, 2017.

9. SUMMARY OF THE ARGUMENT

In his first issue, Braughton asks this Court to establish the parameters for an appellate court to evaluate the weight of the evidence as it relates to the State's non-evidentiary burden of persuasion in a case of self-defense. In this case, the majority and the dissent agree that Braughton met his burden, but the majority and the dissent disagree about how to weigh the evidence in their evaluation of the State's non-evidentiary burden of persuasion.

In his second issue, Braughton contends that when the evidence is correctly weighed, under this Court's precedent in *Zullani*, *Saxton*, *Brooks*, and *Adames*, the evidence establishes that Braughton acted in self-defense and/or defense of others. And, therefore, the intermediate-appellate court erred in affirming the verdict.

In his final issue, Braughton contends that the intermediate-appellate court erred when it found that the erroneous decision to not include felony-deadly conduct as a lesser-included offense in the jury charge was harmless. The appellate court found that because the jury charge included manslaughter as a lesser-included offense and the jury rejected that charge, that the jury would have rejected felony-deadly conduct as well. The appellate court's reasoning is flawed because Braughton admitted to acting "knowingly" when he shot Dominguez and manslaughter required him to have acted "recklessly." Manslaughter required a

showing of "reckless" conduct, but felony-deadly conduct required a showing of "knowing" conduct. Therefore, any juror who believed that Braughton acted "knowingly" was prohibited from finding that Braughton committed manslaughter and was forced to choose between: 1) convicting Braughton of murder; 2) acquitting Braughton; or, 3) disregarding the plain language of the jury charge. This is precisely the choice that this Court has sought to avoid imposing on jurors. Accordingly, the error was harmful and the intermediate-appellate court erred in finding otherwise.

10. ARGUMENT

FIRST ISSUE PRESENTED

I. Grant of Review

This Court granted review to answer the question how should a reviewing court weigh all of the evidence, in the context of a sufficiency of the evidence claim under *Jackson v. Virginia*, to determine the merits of a defense on which the defendant carried his or her evidentiary burden of production but the State bore the ultimate burden of persuasion?

II. Scope of Issue

This issue does not concern the application of the standard of review to the facts of this case; the application of the facts of this case to the proper standard of review is reserved for the second issue. Instead, this issue asks how a reviewing court should evaluate the sufficiency of the evidence in a claim of self-defense. In this issue, Appellant:

- Provides the Law on Self-Defense;
- Provides the Law on the Standard of Review;
- Describes how the Majority and the Dissent Reached their Conclusions;
- Examines why the Majority's Bases for its Reasoning are Erroneous; and,
- Identifies the Proper Analysis.

III. Law

A. Penal Code

A person may use deadly force to defend himself or others if he "reasonably believes" that the use of deadly force is "immediately necessary" to protect himself or someone else "against the other's use or attempted use of unlawful deadly force." TEX. PENAL CODE §§ 9.32 & 9.33(a).

B. Common Law Allocation of Burdens in a Challenge to the Sufficiency of the Evidence

When a defendant acts in self-defense or in defense of others, that defendant has the burden of production and the State has the burden of persuasion. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003); *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991). Once the defendant has met his or her burden of production, then State must prove, beyond a reasonable doubt, that the defendant was unjustified in his or her use of deadly force. *Alonzo v. State*, 353 S.W.3d 778, 781 (Tex. Crim. App. 2011).

IV. Standard of Review

A. *Saxton* and *Zuliani*

Building on the familiar *Jackson v. Virginia* standard, this Court established the standard of review for a review of a challenge to the sufficiency of the evidence to refute a claim of self-defense in *Saxton*. 804 S.W.2d at 914. In *Saxton*, this Court wrote:

> In resolving the sufficiency of the evidence issue, we look not to whether the State presented evidence which refuted appellant's self-defense testimony, but rather we determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of murder beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt.

Id.

In 2003, this Court, in *Zuliani* (a factual-sufficiency case), explained that: "Once the defendant produces the required evidence, the State then bears the burden of persuasion to disprove the raised defense" beyond a reasonable doubt. *Zuliani*, 97 S.W.3d at 594. *Zuliani* cited to *Saxton* as the proper application of the legal-sufficiency standard in a claim of self-defense. *Id*.

B. *Brooks* and *Adames*

In 2010, in *Brooks*, this Court acknowledged that no meaningful distinction existed between a factual-sufficiency analysis and a legal-sufficiency analysis. In reaching this conclusion, this Court wrote:

> the factual-sufficiency standard from *Watson* may be reformulated as follows: 'Considering all of the evidence in the light most favorable to the verdict, was a jury rationally justified in finding guilt beyond a reasonable doubt.' This is the *Jackson v. Virginia* legal-sufficiency standard. There is, therefore, no meaningful distinction between the *Jackson v. Virginia* legal-sufficiency standard and the *Clewis* factual-sufficiency standard, and these two standards have become indistinguishable.

Brooks v. State, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010).

Finally, in *Adames*, this Court explained that in a federal due-process evidentiary-sufficiency review, a reviewing court must view all of the evidence—and not just the evidence that supports the verdict. *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011). This evidence is viewed in the light most favorable to the verdict to determine whether any *rational* trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*.

C. Affirmative Defenses v. Justification Defenses

In 2013, this Court explained that Texas courts use the Texas civil burdens of proof and standards of review when reviewing a challenge to a finding concerning an affirmative defense. *Matlock v. State*, 392 S.W.3d 662, 667 (Tex. Crim. App. 2013). But this Court has never applied the civil standard to a justification defense. *Zuliani*, 97 S.W.3d at 594. Instead, the State must show, beyond a reasonable doubt, that the complained of act was not justified. *Id*.

V. Evaluating the Evidence in this Standard of Review

Perhaps because, post-*Adames*, this Court has not yet instructed the intermediate-appellate courts how to weigh all of the evidence to determine whether a defendant carried his burden of production and whether the State then bore its burden of persuasion, the majority and the dissent in this case weighed the evidence and came to different conclusions.

As a preliminary matter, both the majority and the dissent agree that Braughton met his burden of production. [Majority, 31; Dissent, 27]. Accordingly, it is unnecessary for this Court to address this prong of the standard. Instead, this Court can limit its review to a determination of whether the intermediate-appellate court properly weighed the evidence when it concluded that the State met its non-evidentiary burden of persuasion.

A. Majority

In concluding that the State met its burden, the majority opinion makes no effort to explain how it evaluated the State's non-evidentiary burden of persuasion and instead flatly states that "the State's 'burden of persuasion is not one that requires the production of evidence, rather it requires only that the State prove its case beyond a reasonable doubt.'" [Majority, 30]. The majority also wrote, "[a]lthough the State was not required to produce evidence refuting Chris's theories, it still had the obligation to present evidence sufficient to permit the jury to reach its verdict of guilty, implicitly rejecting those [defensive] theories." [Majority, 31]. These statements provide no direction on how the State evaluated or weighed the evidence. The majority, however, concluded that the State carried its burden of persuasion.

To reach this conclusion, the majority reasoned:

1) "the jury could have discredited the testimony that Mrs. Braughton called Chris before the fight began—testimony undermined by the absence of any

phone records demonstrating that it occurred or any data retrieved from any phone found at the scene;" [Majority, 32]

2) "the cut on Braughton Sr.'s lip and [the] presence of Braughton Sr.'s DNA on Dominguez's hand indicates only that Dominguez punched Braughton once;" [Majority 32]

3) that even if the Court credited the testimony that Braughton Sr. was punched three times by an extraordinarily intoxicated Marine, "the jury could have rationally concluded that Chris's use of deadly force was not immediately necessary for Chris to protect his father" because, by the third punch "Braughton Sr. was on the ground" and "Dominguez had no weapon and was not using his hands as deadly weapons, and was not kicking or jumping on Braughton Sr."

4) that "Braughton Sr.'s injuries—a bloody lip—were not serious" [Majority, 33]

5) Chris's mother's statement for him to put down the gun and her asking him "what did you do?" [Majority, 33]

6) that Dominguez had stopped punching by the time Braughton fired and that "the punches that [Dominguez] had <u>landed</u> on Braughton Sr. <u>up to that point</u> do not amount to deadly force that could create a reasonable belief that deadly force was necessary."

7) the majority concluded, "In sum, Chris adduced no evidence that Dominguez used his hands in a deadly manner or used or threatened to use deadly force of any kind before Christ brought a gun to the encounter" [Majority, 34]

To reach its final conclusion, the Majority relied on the fact that no gun was found and concluded that "although the jury could have credited testimony that Chris reasonably believed that deadly force was immediately necessary, it was also free to reject the testimony that Dominguez threatened Chris with and attempted to retrieve

a gun, particularly when no gun other than Chris's was ever recovered." [Majority, 34].

After explaining why the majority found Braughton's critique of "Gina's" testimony unpersuasive, the majority wrote "the jury rationally could have chosen not to believe Chris and his family's testimony that would have supported a finding that Chris reasonably believed deadly force was immediately necessary to protect himself or a third person from Dominguez's impending attempted use of deadly force." [Majority, 38].

B. Dissent

Justice Keyes, in dissent, argued that, post-*Adames*, there has been no direction from this Court on how the appellate courts should weigh all of the evidence to determine the merits of a defense on which the defendant bore the burden of production and the State bore the ultimate burden of persuasion. [Dissent, 22].

The dissent argued that it:

> would apply the standard for reviewing the evidence as set out in *Jackson*, *Brooks*, *Saxton*, and *Zuliani*. [Under this standard], this Court must review all of the evidence that a *reasonable* jury would credit and must determine whether, in light of the state of the evidence as a whole, a reasonable jury could have found the essential elements of murder beyond a reasonable doubt and also could have found against appellant on his defensive issues beyond a reasonable doubt.
>
> [t]o apply any other test for the sufficiency of the evidence on appellant's defenses, on which he had the burden of making a prima facie case and the State had the burden of persuasion, or the burden of overcoming that prima facie case, would be to ignore the State's burden

> of persuading a reasonable jury that its rejection of the defenses of self-defense and defense of a third person would be rational in light of all of the evidence, as required by *Saxton*, *Zuliani*, and *Adames*. And it would make the jury's determination of the sufficiency of the evidence to reject [an] appellant's defenses of self-defense and defense of a third party impervious to review by [any] appellate court. No matter how irrational the jury's rejection of the defense, its conclusion would be *ipso facto* correct so long as evidence supported the murder conviction once the defenses were irrationally discounted.

(emphasis original.). [Dissent, 24].

The dissent agreed that appellant met his burden of production. [Dissent, 27]. But the dissent argued that "after viewing all the evidence in the light most favorable to the prosecution, this Court was required to determine whether any rational trier of fact would have also found the essential elements of murder beyond a reasonable doubt and *also* would have found *against appellant* on the self-defense or defense of a third person issue *beyond a reasonable doubt*." (emphasis original, internal quotations removed.). [Dissent, 28]. Ultimately, the dissent concluded that the State had failed to meet its burden. [Dissent, 36].

To support its conclusion that the State failed to carry its burden of persuasion, the dissent relied on the following arguments:

1) That no rational juror could have believed Gina's testimony because: a) it was contradicted by the physical evidence, b) it was replete with inconsistencies, and, c) she viewed the events through a window that, even at night, had a solar shade that covered it and which blocked out 90 percent of visible light and which rendered everything that Gina saw "blurry";

2) All of the remaining credible evidence supports the version of the events provided by Braughton;

3) The majority erred "by indulging in speculation as to how the jury's verdict might be justified by what was *not* in evidence." Specifically, the dissent flogged the majority for speculating about why there were no phone records or other documentary evidence of the phone call from Mrs. Braughton to Braughton. But, more importantly, the dissent correctly asserted, "regardless of how appellant learned of the conflict, the undisputed evidence demonstrates that appellant did not know Dominguez prior to the confrontation, that appellant came out of the house in close proximity to his family's arrival near their home, and that appellant observed Dominguez [] harming his father at that time." [Dissent, 33].

4) That the majority erred in concluding that no rational person could have concluded that the use of deadly force was immediately necessary to protect Braughton because "the DNA evidence 'indicat[ing] only that Dominguez punched Braughton Sr. once." [Dissent, 34]. The dissent is correct to point out that the majority's view of this evidence, "disregards the fact that appellant saw Dominguez—a man with military training and [who] was very intoxicated—assault his father outside the family home . . ." [Dissent, 34]. Instead, the dissent argues that because "appellant saw the assault occur supports his assertion that he acted in defense of a third person." [Dissent, 34].

5) The dissent also is correct in pointing out that "[t]he fact that the injuries might have been worse, as the majority argues, is again speculative, contrary to fact, and irrelevant." [Dissent, 34]

6) Finally, the dissent argued that the proper standard was whether appellant "'reasonably believe[d] the force [wa]s immediately necessary to protect [himself] against the other's use or attempted use of unlawful deadly force'—not whether the perceived threat happened to be what the actor believed he saw and therefore "the fact that Dominguez did not ultimately have a weapon in his possession is not relevant here." [Dissent, 34].

The dissent concluded, "I would hold that it is irrational to conclude beyond a reasonable doubt based on the totality of the evidence in this case that appellant did not shoot Dominguez in self-defense or in defense of a third person." [Dissent, 36].

VI. *Jackson, Brooks, Saxton,* and *Zuliani* Provide the Proper Standard of Review

Jackson, *Brooks*, *Saxton*, and *Zuliani* provide the proper standard of review in determining whether the State met its non-evidentiary burden of persuasion. These established cases require a reviewing court to consider all of the evidence that a reasonable jury would credit and to determine whether, in the context of the state of this evidence as a whole, a reasonable jury could have found the essential elements of murder and that the State carried its burden of persuasion against the appellant on his defensive issue. *Saxton*, 804 S.W.2d at 914.

The majority did not use this standard in its opinion. For the reasons set out below, the majority did not follow the *Saxton*/*Zuliani* standard nor did the majority follow the *Jackson* standard. Instead, the majority birthed a new standard that conflicts with this Court's established precedent.

A. Contrary to *Saxton* and *Zuliani*, the Majority Relied on "After the Fact" Determinations which Irrationally Discount the Evidence

Contrary to the *Saxton*/*Zuliani* standard, here the majority makes at least three after the fact determinations, each of which undermines the reasoning in its opinion.

First, the majority makes much of the fact that Braughton Sr.'s injuries were not severe; the opinion states, "indeed, Braughton Sr. did not receive any medical treatment for his injuries." [Majority, 33]. A measure of the severity of the injuries

to a person who relies on deadly force for self-defense is a determination that can only be made after the incident has concluded and only with the subjective conclusion that if deadly force had not been used then no further injuries would have occurred. There is, of course, no evidence of what Dominguez would have done had Braughton not acted. Incorporating this sort of after the fact reasoning into the standard of review is fallacious and such reasoning irrationally discounts the evidnce of Dominguez's assault.

Second, the majority reasoned that, the fact that "the punches that [Dominguez] landed on Braughton Sr. up to that point do not amount to [the use of] deadly force" allowed the jury to determine that the use of deadly force was not justified. [Majority, 33]. But the fact that the punches that Dominguez landed on Braughton Sr.'s face did not cause major trauma and were not, in the majority's opinion, deadly force, is wholly unrelated to whether Braughton reasonably believed that Dominguez used or attempted to use deadly force against Braughton Sr. TEX. PENAL CODE §§ 9.32(a)(2); 9.33. The majority opinion contends that Braughton should have waited until the injuries to his father were to some measurable degree more medically significant before acting—this sort of rationalization of the jury's verdict negates the defense of others statute and irrationally discounts the evidence of Dominguez's assault.

Finally, the majority finds it significant that the police never recovered a gun from the scene. Whether the assailant actually had a deadly weapon that was not produced during the altercation cannot be a relevant factor in determining whether Braughton was justified in using deadly force in protecting his father. TEX. PENAL CODE §§ 9.32(a)(2); 9.33. Instead, the question is whether Braughton reasonably believed that Dominguez had used or was attempting to use deadly force and that it was immediately necessary for Braughton to use deadly force to protect himself or his father; no court has ever held that the only way to use or attempt to use deadly force is to employ a firearm. Whether—after the fact—the police located a gun, under the facts of this case, is not germane and thus this reasoning irrationally discounts the evidence of what Braughton perceived when he made the decision to discharge the firearm and should not have contributed to a finding that the State carried its burden of persuasion.

B. Under *Saxton*/*Zuliani*, the Jury had to Act Rationally in Evaluating the Evidence; the Majority did not Require the Jury to Act Rationally

The majority's reasoning is fallacious because it allowed the jury to irrationally discount much of the evidence.

For example, the majority's reasoning irrationally discounted the evidence of Braughton's mother's phone call.

The majority claims that, ". . .the jury could have discredited the testimony that Mrs. Braughton called Chris before the fight began—testimony that was

undermined by the absence of any phone records demonstrating that it occurred or any data recovered from any phone found at the scene." [Majority, 32].

While it is true that a jury may "disbelieve all or any part of a witness's testimony and was not required to accept the testimony . . . [of] witnesses [whose testimony was] not contradicted" the acceptance or rejection of the testimony must—necessarily—be rational. Here, the majority concluded that, "Although no witness testified that the call did not occur," the jury had the prerogative to disregard this evidence. But the jury had to have had a rational reason to have disregarded this evidence because no jury is entitled to act irrationally; otherwise, any conclusion that supports the jury's verdict, without regard for the evidence, is justifiable. In an extreme example, under the majority's reasoning, the jury was free to reject the considerable evidence that Braughton came out of the house shortly after Dominguez arrived and the jury was instead free to conclude instead—based on no evidence—that Braughton was hiding in bushes waiting until his parents returned home so that he could murder a person who was previously unknown to him and who might serendipitously appear at the end of this cul-de-sac. Such a conclusion is irrational based on all of the evidence presented in this case. It is equally irrational for the jury to have discounted the testimony that Mrs. Braughton called Braughton shortly before the family got home and told Braughton, in a terrified voice, that they were being chased.

But, even if the majority is correct that the jury was free to disregard the testimony concerning Mrs. Braughton's call to her son, the majority erred by ending its analysis with this conclusion. Instead, even if the majority rightly determined that the jury could discount the evidence of Mrs. Braughton's phone call, the majority had to have addressed the considerable testimony that—for whatever reason—Braughton came out of his house shortly after his family got home, that he came out of his home with a gun pointed in the air, that his mother and thirteen-year-old-younger brother ran past Braughton into the house in fear that Dominguez was going to kill the family, and that this all occurred while Dominguez beat Braughton Sr. in the face. [6 RR 195; 7 RR 28-29]. The majority did not address this evidence.

Here, there was no rational basis to have discounted the testimony concerning the phone call to Braughton. But, even if the jury had the prerogative to do so, the majority's opinion is incomplete because it failed to consider all of the other reasons that Braughton had to perceive Dominguez as a threat. The majority's incomplete and fallacious reasoning should not have contributed to the conclusion that the State satisfied its burden of persuasion.

C. *Saxton*/*Zuliani* Does not Permit Speculation; The Majority Reveled in Speculation

Similarly, contrary to *Saxton*/*Zuliani*, the majority relied on crude speculation to support its conclusions.

No jury is free to speculate about evidence. Instead, a jury may rely on inferences, and even inference stacking, but it may not speculate. *Elizondo v. State*, 487 S.W.3d 185, 203 (Tex. Crim. App. 2016) (stating, "Although a jury can rely upon wholly circumstantial evidence to find provoking acts or words, such evidence must create more than a suspicion because juries are not permitted to reach speculative conclusions.").

Here, the majority wrote, "the cut on Braughton Sr.'s lip and [the] presence of Braughton Sr.'s DNA on Dominguez's hand indicates only that Dominguez punched Braughton Sr. once." [Majority, 32].

This description of the evidence is logically incorrect. Rather, the only rational conclusion from the combined force of the evidence of Braughton Sr.'s injury and the DNA is that Dominguez punched Braughton Sr. The combined force of this evidence provides no suggestion of how many times Dominguez punched Braughton Sr. The evidence does not support the majority's conclusion that Dominguez punched Braughton Sr. only once. The majority's conclusion is, generously, speculation. This speculation irrationally discounted the evidence of the assault and distracted from the only relevant question: did Braughton believe that the use of deadly force was immediately necessary to protect himself or his family from Dominguez's use or attempted use of deadly force. This reasoning should not have contributed to a finding that the State carried its burden of persuasion.

D. *Saxton*/*Zuliani* Require the Evidence to be Viewed within the Context of the Governing Law; The Majority Disregarded the Plain Language of the Statute

The majority contends that even if the panel decided to credit the testimony that Dominguez punched Braughton Sr. three times that, by the third punch, Braughton Sr. was on the ground, Dominguez had no weapon, Dominguez was not using his hands as deadly weapons, and Dominguez was not "kicking or jumping on Braughton Sr." and therefore "the jury could have rationally concluded that Chris's use of deadly force was not immediately necessary for Chris to protect his father." The majority also concluded that "Chris adduced no evidence that Dominguez used his hands in a deadly manner or used or threatened to use deadly force of any kind before Chris brought a gun to the encounter." [Majority, 34].

But these conclusions neglect to address the plain language of the statute. Instead whether the State carried its burden must be evaluated against the plain language of the statute, which requires a jury to determine whether "the actor reasonably believes the deadly force is immediately necessary. . . to protect the [third party] against [another's] use or attempted use of unlawful deadly force." TEX. PENAL CODE §§ 9.32(a)(2); 9.33.. The majority's reasoning failed to incorporate the portions of the statute that required the panel to consider whether Braughton reasonably believed that the use of deadly force was immediately necessary to protect his father against Dominguez's use or attempted use of unlawful deadly force

and thus irrationally discredited the evidence of Dominguez's assault on Braughton Sr. *Id*.

Instead, the majority's conclusions are devoted to the argument that Dominguez did not actually use deadly force to justify the jury's findings; such an incomplete analysis has no role in determining whether the State carried its burden. *Id*.

Therefore, the majority's reasoning irrationally discounted evidence of Dominguez's assault and contributed to the majority's erroneous decision.

E. The Standard of Review Must Require the Reviewing Court to Evaluate all of the Evidence that a Rational Jury Could have Relied Upon; The Majority Relied on Slices of Evidence without Context

Here, the majority parsed the evidence and never viewed the evidence in context. [Majority, 31-39]. The majority never included a discussion of the fact that Dominguez was intoxicated (at two and perhaps three times the legal limit), that he abandoned his motorcycle in such a way that it fell to the ground while the motor was still running, the headlight remained on, and the rear wheel continued to turn until the police shut the motorcycle off, that Mrs. Braughton and her thirteen-year-old-younger son (regardless of whether Mrs. Braughton called Braughton) ran past Braughton into the home, that before the shooting that Braughton Sr. said to call 9-1-1, that Irving and Bannon each testified that Braughton came outside with the gun pointed into the air and demanded for Dominguez to "stop," or that Dominguez had

just fought with his live-in-girlfriend to the point that he abandoned her at an unfamiliar bar with people whom she had met only that day/night.

F. Conclusion

Accordingly, Braughton asks this Court to use these points to instruct the appellate courts on how to weigh the evidence in a justification defense in which the defendant must produce evidence and the state must persuade the jury beyond a reasonable doubt.

VII. Proper Analysis

This Court provided the proper analysis for reviewing the evidence in *Brooks*, *Saxton*, *Zuliani*, and *Adames*. Under this standard, a reviewing court must review all of the evidence that a reasonable jury would credit and must determine whether, in light of the state of the evidence as a whole, a reasonable jury could have found the essential elements of murder beyond a reasonable doubt and also could have found against appellant on his defensive issues beyond a reasonable doubt.

VIII. Conclusion

Braughton asks this Court to direct the appellate courts on how to weigh all of the evidence and to determine the strength of a justification defense on which the defendant bore the burden of production and the state bore the ultimate burden of persuasion.

11. SECOND ARGUMENT

SECOND ISSUE PRESENTED

> In his second issue, Braughton asks whether the intermediate-appellate court erred when it determined that the State met its non-evidentiary burden of persuasion and concluded that Appellant was unjustified in acting in self-defense/defense of others.

I. Grant of Review/Introduction

By irrationally discounting evidence and thus weighing the evidence erroneously, the intermediate-appellate court reached the wrong conclusion when it decided that the State met its non-evidentiary burden of persuasion.

II. Proper Standard

The dissent explained the proper standard for weighing the evidence, writing: "[t]his Court's job is to review the evidence that a *rational* jury could have credited in rejecting the defense as insufficiently supported by the evidence beyond a reasonable doubt and to determine whether that evidence was, in fact, sufficient to support rejection of the defense—not to rubber-stamp the findings of juries of trial courts." (emphasis original.). [Dissent, 24].

Both the majority and the dissent agree that Braughton met his burden of production. [Majority, 31; Dissent, 27]. Accordingly, Braughton devotes his argument to the analysis of the State's non-evidentiary burden of persuasion. As this Court instructed in *Adames*, a reviewing court must weigh all of the evidence and not just the evidence that favors the verdict. *Adames*, 353 S.W.3d at 860.

III. Evidence

A. Testimony at Trial

As his first witness, the attorney for the State called Corporal J. Talbert of the Harris County Constable's Office. [3 RR 30]. Corporal Talbert testified that he responded to the 9-1-1 call from the Braughtons. [3 RR 57]. When he arrived, Braughton Sr. told him that he was the father of the shooter and Braughton admitted to Corporal Talbert that he had shot Dominguez. [3 RR 37–38]. Corporal Talbert also testified that when he arrived that Braughton Sr. had blood on his lip. [3 RR 39; 56; State's Ex. 26].

The attorney for the State then called Sergeant A. Alanis, of the Harris County Sheriff's Department's homicide unit. [3 RR 62–63]. When Sergeant Alanis arrived at the scene, Dominguez's motorcycle was still turned on and "running." [3 RR 68]. He testified that a cellular telephone was recovered by someone other than him, that the owner of the phone was not known, and that the phone had been reset remotely. [3 RR 80–81]. According to Sergeant Alanis's investigation, when Braughton exited his house he did so with the gun "[p]ointed in the air" and not at Dominguez. [3 RR 95; 96]. Sergeant Alanis testified that no weapons were found in the Braughton family's car or on the motorcycle. [3 RR 101].

The State's next witness, Deputy D. Medina, testified that she serves in the Harris County Sherriff's Department's crime scene unit. [3 RR 117–20]. She

testified that when she arrived that the headlight on Dominguez's motorcycle was still on and that Dominguez's body lay next to the motorcycle. [3 RR 120]. She testified that she asked Braughton about his activities between the time of the shooting and the forensic tests that members of her unit had conducted on him and Braughton said, "[I] saw a man hitting my dad in the face and I shot him." [3 RR 132]. She also testified that Braughton told her that "he put the gun inside the house and it was on the dining room table,. . ." [3 RR 132]. She testified that Braughton fired only one round. [3 RR 173].

Bannon testified that he was near the scene of the shooting but that he did not see it occur. [4 RR 11]. He testified to Dominguez's motorcycle being only a foot or two from the bumper of Melissa's car as the two vehicles traveled down the cul-de-sac. [4 RR 15]. He testified that the driver of Melissa's car stopped the car, got out, and started to yell at Dominguez who immediately yelled back. [4 RR 16–17]. According to Bannon, Braughton Sr. and Dominguez started to approach each other and then a lady got out of the passenger's side of the Braughtons' car. [4 RR 20]. Then Bannon saw Braughton come out of his parents' house with a gun "raised up on the air" and heard him yell, "I have a gun." [4 RR 22; 56]. Bannon also heard the woman say to Dominguez that they are recording "this" and he heard Braughton Sr. tell Braughton to "go back inside." [4 RR 23]. Bannon believed that a fight was imminent and he went into his house to get his gun "to try to diffuse [*sic*.] the

situation, have him put down his gun." [4 RR 22–24]. Bannon was inside of his house for "about a minute" and when he came back outside Dominguez had been shot and Melissa was administering CPR. [4 RR 25–32; 70]. Bannon characterized Braughton as "just trying to defend his dad." [4 RR 67].

As his next witness, the attorney for the State called Gina. [4 RR 76]. She testified that the first suggestion that she had that something unusual might be occurring was the sound of arguing. [4 RR 82]. Gina testified that she heard yelling, but never saw a fight; she assumed, however, that people were fighting. [4 RR 90; 114]. She also testified that she never saw a gun and that a protective film that covered her window rendered the scene "blurry." [4 RR 112–13]. She testified that Melissa told Braughton to "put the gun down" and that she heard Braughton say "No, I have a gun now." [4 RR 91]. According to Gina's testimony, she never heard Dominguez "say anything." [4 RR 93]. She also testified that Braughton approached Dominguez with "his right arm stretched out with a gun in his hand." [4 RR 92; 93]. She testified that she saw Braughton shoot Dominguez and that when the shot was fired that Dominguez had his hands up and was backing away from Braughton. [4 RR 94–96].

The attorney for the State then called Cavender. She provided no testimony concerning Dominguez's interactions with Braughton, but she did testify to Dominguez's state of mind shortly before he confronted Braughton. Specifically,

Cavender testified that Dominguez had been drinking for most of the day and much of the evening, that Dominguez was drunk, that she and Dominguez had quarreled, that Cavender refused to get on Dominguez's motorcycle with him, and that Dominguez had abandoned Cavender at an unfamiliar bar. [5 RR 20–23; 51–52].

Dr. Gonsoulin testified as the State's next witness. [5 RR 60]. She testified that she conducted the autopsy on Dominguez and that he died of a "gunshot wound in the back." [5 RR 64]. She clarified her testimony to say that Dominguez was shot in the right armpit and the bullet traveled laterally through his body and stopped before exiting through his left armpit. [5 RR 71; 73]. Dr. Gonsoulin testified that based on the entry point of the bullet, the gun could not have been directly in front of Dominguez when it was discharged. [5 RR 79; 85]. She testified further that there was nothing inconsistent with either: 1) Dominguez backing up and turning when he was shot; or, 2) that Dominguez was bending and reaching for something when he was shot. [5 RR 81; 92].

The State's remaining witnesses did not testify to the interaction between Dominguez and Braughton.

As his first witness, Braughton called Glen Irving. [6 RR 83]. Irving lived near Braughton and Dominguez. On May 23, 2013, he went outside to see the neighborhood cats and then "all of the sudden" there was "a car and a motorcycle that was following right on the bumper of the car." [6 RR 86; 88; 89]. He saw the

vehicles come to a stop and the "person on the motorcycle, like, abruptly gets off of the motorcycle,. . . [and] the motorcycle, like, fell." [6 RR 90]. The person from the motorcycle then "rather quickly headed to the car that had stopped." [6 RR 91]. Then the driver of the car got out and "the guy who was riding the motorcycle started punching and beating up the person that had gotten out of the car." [6 RR 92]. After a moment, Irving heard "a voice kind of loudly, maybe shouting, saying 'Stop, I've got a gun'" and then repeat the warning. [6 RR 93]. "Shortly after that, the person [who] was being beat up, was knocked to the ground. Then the person who had been riding the motorcycle turned and started back towards the motorcycle, and I heard the voice say, 'Yeah, I got a gun, too, motherf****r.'" [6 RR 93]. And then Irving heard but did not see a gunshot. [6 RR 93]. Irving never saw Dominguez reach toward the motorcycle but testified that had Dominguez done so that Irving probably would have seen tat but Irving, could not "say positively that I would have seen it." [6 RR 118-19].

Braughton then called his father. [6 RR 138]. Braughton Sr. testified to leaving the restaurant around ten o'clock pm, to noticing the motorcycle, to the motorcycle passing them and then coming to an abrupt stop requiring him to slam on his brakes, and to Melissa calling Braughton and telling him, "Son, there's a guy chasing us. I'm scared." [6 RR 149; 180–88]. Braughton Sr. testified to being beaten by Dominguez and to hearing his son say, "Stop, I have a gun. Stop, I have a gun."

[6 RR 153–54]. After Braughton Sr. heard this, Dominguez pushed him to the ground. [6 RR 154]. Braughton Sr. then heard Dominguez say, "You got a gun, motherf****r, I have something for your f*****g ass." [6 RR 155; 198]. Braughton Sr. testified that Dominguez then opened a saddlebag on the motorcycle and Braughton pulled the trigger. [6 RR 200–01]. Braughton Sr. then spoke with a 9-1-1 operator and emphasized the urgent need for emergency-medical care. [6 RR 212].

Braughton then called his mother, Melissa. [7 RR 19]. She testified to leaving the restaurant around ten o'clock pm. [7 RR 21]. She also testified to the drive home, the alert going off in the vehicle because Dominguez was operating his motorcycle so close to their bumper, and to a frantic call to Braughton in which she said, "Son, this guy is chasing us. We are right by the house." [7 RR 26]. She testified to Dominguez beating her husband and to Braughton coming outside with a gun pointed into the air and saying "Stop, I have a gun." [7 RR 29]. Melissa also heard Dominguez say, "You have a gun motherf****r, I have a gun for you." [7 RR 30]. Melissa then testified that she heard the gunshot. [7 RR 31]. Melissa denied telling Braughton to take the gun back inside. [7 RR 54; 56].

Braughton testified in his own defense. [7 RR 75]. Braughton testified to receiving a frantic call from his mother about an unknown person chasing them home. [7 RR 75]. Braughton testified that he saw Dominguez "attacking [his] dad" and that he had never met Dominguez before the night of the shooting. [7 RR 77–

78]. He testified to leaving the house with the gun pointed into the air and saying, "Stop, I have a gun," to saying it at least two times, and to running toward his father. [7 RR 79; 81]. Braughton saw his father be shoved the ground and then heard Domingez say, "Oh, you have a gun, motherf****r. I have a gun for you." [7 RR 82]. According to Braughton, this was the first time he "pulled the gun down." [7 RR 98; 109]. Braughton then saw Dominguez open the saddlebag. [7 RR 82]. Braughton testified that he shot, "towards [Dominguez's] arm" and that he shot only one time. [7 RR 84]. According to Braughton, his "goal was to stop this man from attacking my family." [7 RR 86]. Braughton also testified that he was afraid for his life. [7 RR 86].

B. The Majority's Reasoning

The State had the burden to establish, beyond a reasonable doubt, that Braughton did not "reasonably believe[]" that the use of deadly force was "immediately necessary" to protect himself or his father "against [Dominguez's] use or attempted use of unlawful deadly force." TEX. PENAL CODE §§ 9.32 & 9.33(a).

In concluding that the State met is burden, the majority reasoned that:

1) "the jury could have discredited the testimony that Mrs. Braughton called Chris before the fight began—testimony undermined by the absence of any phone records demonstrating that it occurred or any data retrieved from any phone found at the scene;" [Majority, 32]

2) "the cut on Braughton Sr.'s lip and [the] presence of Braughton Sr.'s DNA on Dominguez's hand indicates only that Dominguez punched Braughton once;" [Majority 32]

3) that even if the Court credited the testimony that Braughton Sr. was punched three times by a severely intoxicated Marine, "the jury could have rationally concluded that Chris's use of deadly force was not immediately necessary for Chris to protect his father" because by the third punch "Braughton Sr. was on the ground" and "Dominguez had no weapon and was no using his hands as deadly weapons, and was not kicking or jumping on Braughton Sr."

4) That "Braughton Sr.'s injuries—a bloody lip—were not serious" [Majority, 33]

5) Chris's mother's statement for him to put down the gun and her asking him "what did you do?" [Majority, 33]

6) That Dominguez had stopped punching by the time Braughton fired and that "the punches that [Dominguez] had landed on Braughton Sr. up to that point do not amount to deadly force that could create a reasonable belief that deadly force was necessary."

7) The majority concluded, "In sum, Chris adduced no evidence that Dominguez used his hands in a deadly manner or used or threatened to use deadly force of any kind before Christ brought a gun to the encounter" [Majority, 34]

To reach its final conclusion, the Majority relied on the fact that no gun was found and concluded that "although the jury could have credited testimony that Chris reasonably believed that deadly force was immediately necessary, it was also free to reject the testimony that Dominguez threatened Chris with and attempted to retrieve a gun, particularly when no gun other than Chris's was ever recovered." [Majority, 34].

IV. Analysis

The majority erred when it found that the State carried its burden. Specifically, the majority's reasoning fails to account for this Court's decision in

Adames, *Saxton*, and *Zuliani* in which this Court instructed the reviewing courts to weigh all of the evidence and not just the evidence that favors the verdict. *Adames*, 353 S.W.3d at 860; *Zuliani*, 97 S.W.3d at 594; *Saxton*, 804 S.W.2d at 914. Instead, the majority parses individual components of the case and concludes, from the perceived deficiencies these selected pieces of evidence, that Appellant's entire challenge to the evidence fails. Instead, when all of the evidence is considered, the State failed to carry its burden.

A. The Drive Home and Mrs. Braughton's Call

Gina first suspected that something was afoot when she heard arguing. [4 RR 81; 82]. When she heard the arguing Gina was in her bed. [4 RR 81]. Presumably, because Gina first suspected a problem when she heard arguing, she did not look outside until after Dominguez had chased the Braughton family car to their driveway. [4 RR 84]. Further, when Gina looked outside, Braughton had already come out of the house. [4 RR 87-88]. Gina "couldn't make out what [the people outside] were saying. [She] just heard arguing." [4 RR 90]. Gina never saw any fighting. [4 RR 90]. Gina's view of the scene was so obscured that she was unable to identify Braughton as the man with the gun when asked to do so during trial. [4 RR 91].

The majority contends that the jury could have "discredited the testimony that Mrs. Braughton called Chris before the fight began." [Majority, 32]. Yet, to

disregard this, the jury would have had to have disbelieved Mrs. Braughton, Braughton Sr., and Braughton and to devised some other-rational reason that Braughton came out of the house when he did. There is, however, no other evidence that would explain or even suggest why Braughton came out of the home when he did. Further, both Sergeant Alanis and Bannon—witnesses for the State—testified that Braughton came out of his parents' home with a gun raised in the air yelling for someone to stop and cautioning that he had a gun. [3 RR 95; 96; 4 RR 22; 56]. If Ms. Braughton never called Braughton then there is no rational explanation for him to have come outside of the home, with a gun (that he kept in his parents' room) pointed into the air, to have yelled for Dominguez to stop, or for Braughton to have cautioned the assailant that he had a gun.

The jury had the prerogative to believe some evidence and to disbelieve other evidence, but the exercise of that prerogative must be rational. If Braughton's mother did not call him, tell him that they were being chased, and communicate her fear, then there is a complete lack of evidence to explain why Braughton came out of the house at the moment that he did, with a gun in his hand but raised in the air, and yelled for someone to stop doing something, and cautioning that Braughton had a gun. Disregarding the evidence of this phone call—and the influence it had on Braughton's perception Dominguez and the events going on outside of his parents'

home—is irrational. Accordingly, the evidence of the phone call and Braughton's subsequent conduct must weigh against the State's burden of persuasion.

B. The Shooting

Gina testified that when she looked out of her window that she could not see the face of the person who did the shooting and that all she could say was that he wore a black shirt. [4 RR 90-91]. She also testified that she "couldn't make out what [the people on the street] were saying. [She] just heard arguing." [4 RR 90]. And she testified that she never saw a fight; she testified, "I did not see them physically fight." [4 RR 90; 114; 115]. Gina testified that she saw Braughton "walking towards the man in the red shirt [Dominguez] with his right arm stretched out with a gun in his hand." [4 RR 92]. According to Gina, Mrs. Braughton said "[p]ut the gun down" and Braughton respond, "No, I got a gun now." [4 RR 93]. Gina testified that Dominguez then slowly backed up and then Braughton fired. [4 RR 96]. According to Gina's testimony, she never heard Dominguez "say anything." [4 RR 93].

Gina's testimony establishes that she saw remarkably little of this encounter, what she did see she observed from approximately 90 feet away through a solar screen that blocked out 90 percent of all visible light, that she—unlike Bannon and Irving—could not hear much of what was said or even shouted, and that she recalled the incident differently at different times. Importantly, Gina testified—contrary to

Bannon, Irving, Braughton, and Braughton Sr.—that she never heard Dominguez "say anything." [4 RR 93]. But simply because Gina did not hear Dominguez "say anything" does not mean that he did not speak. [4 RR 93]. Instead, Gina's testimony only supports the conclusion that she did not hear Dominguez speak. [4 RR 93]. Gina testified that she had difficulty hearing what was being said outside of her window and the fact that she never heard Dominguez speak is not evidence that he was silent.

Braughton Sr., Mrs. Braughton, Bannon, and Irving—but not Gina—all testified to Dominguez's threatening driving.

Bannon, Irving, and Sergeant Alanis—but not Gina—each testified that Braughton left the house with the gun in the air and told Dominguez to stop assaulting Braughton Sr. and that Braughton warned Dominguez that he had a gun. Although Bannon then went inside of his house, Irving remained outside with the neighborhood cats and he testified that he saw Dominguez go "back towards the motorcycle" and that he heard Dominguez say that he too had a gun.

Gina's testimony did little to explain the events of the shooting because she saw only a small fraction of what occurred before the shooting and heard an even smaller fraction. Rather, the testimony of all of the remaining witnesses, including Sergeant Alanis, established what Gina did not see and/or hear. When the testimony of what Gina did not see and/or hear is weighed with the testimony of the shooting

itself, the State has not established, beyond a reasonable doubt, that Braughton's act of self-defense/defense of others was not justified.

C. Autopsy

Dr. Gonsoulin testified that the location of the gunshot wound was consistent with either: 1) Dominguez backing up and turning when he was shot; or, 2) Dominguez reaching for something when he was shot. [5 RR 81; 92]. Fairly, this evidence could support either theory of the shooting. The jury had no rational basis to conclude that the autopsy or the autopsy and the remaining evidence established that Dominguez was backing up and turning when he was shot. Accordingly, the evidence from the autopsy cannot be sufficient to carry or even advance the State's burden of persuasion.

D. The State Failed to Carry its Burden of Persuasion

Gina provided the State's most persuasive testimony, but her testimony is of marginal value because she observed so little of what occurred and because what she did see was obscured by a solar screen that blocked 90 percent of the visible light. Further, unlike all of the other witnesses, Gina could not hear much of what was said or even shouted. Because Gina lacked so much information, she had no context in which to evaluate whether Braughton reasonably believed that deadly force was immediately necessary to protect himself or his father or whether Dominguez used or attempted to use deadly force. Gina, contrary to her statements to the police,

never actually saw a fight. Further, she had no knowledge that Dominguez was drunk, that Dominguez had been in a fight with his live-in-girlfriend and abandoned her at an unfamiliar-karaoke bar, that Dominguez pulled his motorcycle within a foot of the Braughton family's car, that Dominguez assaulted Braughton, that Braughton came outside with the gun pointed in the air and yelled for Dominguez to stop and warned that he had a gun, or that Braughton's mother ran past him into the house with her thirteen-year-old son in fear that Dominguez was going to kill them. Instead, Gina could testify only to Braughton telling his son to go back into the house and to Mrs. Braughton telling her son to put the gun away and to Braughton not putting the gun away and shooting Dominguez. But Gina's testimony never establishes, beyond a reasonable doubt, that Dominguez committed murder and that he did not "reasonably believe[]" that the use of deadly force was "immediately necessary" to protect himself or someone else "against the other's use or attempted use of unlawful deadly force." TEX. PENAL CODE §§ 9.32 & 9.33(a).

To reach the conclusion that Braughton was not justified in his shooting, the majority was required to irrationally discredit the evidence that established Braughton's knowledge of the circumstances immediately before he discharged the gun or to rely on faulty deductions including the fallacious conclusions such as because Braughton Sr.'s injuries were not traumatic, that Braughton did not

reasonably believe that Dominguez did not use or attempt to use deadly force and that the use of deadly force was immediately necessary.

Accordingly, the State failed to carry its non-evidentiary burden of persuasion and the intermediate-appellate court erred in concluding that it did. Thus this Court should reverse the trial court's verdict and render a judgment of acquittal.

V. Conclusion

The majority disregarded the proper standard to weigh the evidence, and when the evidence is weighed as a whole, the State plainly failed to establish, beyond a reasonable doubt, that Braughton's acts were unjustified.

12. THIRD ARGUMENT

I. Grant of Review

This Court granted review to answer the question, "Whether the trial court's erroneous decision not to issue a requested-lesser-included offense was harmless, as the intermediate-appellate court concluded in its re-issued opinion?"

II. Intermediate-Appellate Court's Holding

In its re-issued opinion, the intermediate-appellate court held that "Because manslaughter was just as plausible a theory as deadly conduct, and because the jury rejected manslaughter under the evidence presented, we hold that Chris was not harmed by the trial court's refusal to include his requested instruction on the lesser-included offense of deadly conduct. Accordingly, we overrule Chris's third issue." [Majority, 55].

III. Background

This is a case of self-defense. Self-defense requires that the defendant act knowingly. TEX. PENAL CODE §§ 9.31 & 9.32. The State charged Appellant with murder and the trial court included the lesser-included offense of manslaughter in its charge. [CR 175-98]. The trial court declined to include the requested-lesser included offense of felony-deadly conduct in the charge. [7 RR 116]. The jury convicted Appellant of murder. [CR 212].

The intermediate-appellate court's re-issued opinion concluded that because the jury did not convict Appellant of manslaughter that it never would have convicted him of felony-deadly conduct, "Because manslaughter was just as plausible a theory as deadly conduct,. . ." [Majority, 55]. Based on this reasoning, the intermediate-appellate court concluded that the trial court's error in denying the requested charge was harmless. [Majority, 55].

IV. Law

A. Penal Code

The required mental state for murder is "knowingly or intentionally," the required mental state for manslaughter is "recklessly," and the required mental state for felony-deadly conduct is "knowingly." TEX. PENAL CODE §§ 19.02 & 22.05.

B. Caselaw

i. Saunders v. State

Saunders concerned the denial of a requested-lesser-included offense. In *Saunders*, the defendant was charged with murder, received a lesser-included offense of involuntary manslaughter, and was denied a lesser-included offense of criminally negligent homicide. *Saunders v. State*, 913 S.W.2d 564, 565 (Tex. Crim. App. 1995). This Court explained the difference between the required mental state for involuntary manslaughter and criminally negligent homicide writing, "[t]he only difference . . . is perception of risk; in the former [involuntary manslaughter] the

actor recognizes the risk of death and consciously disregards it, while in the latter [criminally negligent homicide] he is not, but ought to be, aware of the risk that death will result from his conduct." *Id*. This Court then wrote:

> It is not invariably true that the jury's rejection of one lesser included offense will render harmless the trial court's failure to authorize the jury to convict of another lesser included offense also raised by the evidence. On the particular facts of this case, however, we ultimately agree with the court of appeals that it was harmless error not to have instructed the jury it could convict appellant of negligent homicide.

Id. at 572.

This Court continued and wrote, "[o]n the particular facts of this case, then . . . we agree that because the jury did not opt to convict appellant of involuntary manslaughter, failure to authorize conviction for negligent homicide was harmless under *Almanza* and *Arline*." *Id*.

ii. Masterson v. State

In *Masterson*, which relied on *Saunders*, this Court cautioned that, "the [bare] existence of an instruction regarding an intervening lesser offense does not automatically foreclose harm—because in some circumstances that intervening lesser offense may be the least plausible theory under the evidence. . ." *Masterson v. State*, 155 S.W.3d 167, 171 (Tex. Crim. App. 2005).

V. Facts

Braughton's indictment alleged alternate ways in which he could have committed this offense. [CR 18]. The first way was by "intentionally and knowingly

cause[ing] the death of Emmanuel Dominguez . . . by shooting [him] with a . . . firearm." [CR 18]. Alternatively, the State alleged that Braughton intended to "cause the death of [Dominguez] by intentionally and knowingly committing an act clearly dangerous to human life, namely by shooting [him] . . . with a firearm." [CR 18].

Braughton purchased the gun that he used in this offense only a few months before the shooting. [7 RR 72; 76]. The only training that Braughton received concerning the proper use of the gun came from the salesman who sold the gun to him and the only practice he had with the gun was two trips to a gun range. [7 RR 76; 77]. Braughton's parents did not approve of him having a gun, but Braughton and his mother reached an accommodation; Braughton could have the gun if he kept it in his parents' room until he became a licensed peace officer. [7 RR 75; 76].

Braughton and Dominguez had never met before the night of the shooting. [7 RR 78]. On their way home from the restaurant, an alarm in Braughtons' vehicle alerted the family that Dominguez was within a foot or two of their rear bumper. [6 RR 144–45; 7 RR 25]. This alert frightened Mrs. Braughton, who called Braughton and told him in a frantic voice that they were being chased. [6 RR 149; 7 RR 25; 26]. Braughton had never heard his mother speak with such concern. Mrs. Braughton and her younger son ran to the house as Braughton opened the door and came out. [7 RR 28]. Braughton saw Dominguez beating Braughton Sr. and,

holding the gun in the air, yelled, repeatedly, "Stop, I have a gun." [4 RR 22; 56; 6 RR 195; 7 RR 96]. Then Dominguez turned to Braughton and said either, "Yeah, I got a gun, too, motherf****r" or "Oh, you have a gun, MF. I have a gun for you." [6 RR 93; 7 RR 98]. Then Braughton pull[ed] the gun down [i.e. out of the air]." [7 RR 98]. Dominguez then reached toward the saddlebags on the motorcycle and opened one of them. [7 RR 102]. Braughton then pointed the gun "towards Dominguez's arm" but did not aim at "any specific area on him." [7 RR 84; 101; 109]. Braughton pulled the trigger and hit Dominguez under the right armpit. [3 RR 89; 5 RR 66]. Braughton's gun held fourteen bullets but Braughton shot only once. [3 RR 173; 7 RR 84]. According to Braughton, Dominguez never turned his back to Braughton. [7 RR 100]. Mrs. Braughton and Braughton Sr. called 9-1-1 and pleaded with the operator to get an ambulance to the scene expeditiously and Mrs. Braughton performed CPR on Dominguez. [7 RR 31]. Braughton remained at the scene and identified himself as the shooter when the police arrived.

Braughton's attorney requested that the trial court include an instruction on misdemeanor-deadly conduct and felony-deadly conduct in the jury charge. [7 RR 117–18]. The trial court denied both. [7 RR 116]. On appeal, Braughton claimed that the trial court committed reversible error in failing to issue the requested lesser-included offense of felony-deadly conduct.

VI. Application of Law to Fact

The intermediate-appellate court's reasoning that, because the jury did not convict Appellant of manslaughter that it never would have convicted Braughton of felony-deadly conduct, fails because the evidence shows that Braughton acted "knowingly" rather than "recklessly." The required mental state for manslaughter is "recklessly" and the required mental state for felony-deadly conduct is "knowingly." [Majority, 51-55]. For this reason, the panel's reasoning conflicts with this Court's admonishments and holdings in *Masterson* and *Sanderson*, the cases that the intermediate-appellate court relied upon.

Under this charge, any juror who believed that Appellant acted "knowingly"—and considerable evidence, including Appellant's own testimony, supports this conclusion—would not have been able to convict Appellant of manslaughter (with a required mental state of "reckless") and would have had to have convict Appellant of murder, to acquit him, or to deliberately disregard the plain language of the jury charge. This is the exact harm that this Court has sought to avoid and why this Court has instructed the intermediate-appellate courts to liberally grant requests for lesser-included offenses. *Kachel v. State*, PD-1649-13, 2015 Tex. Crim. App. Unpub. LEXIS 402, *4 (Tex. Crim. App. March 18, 2015) (unpub. op.)(*citing Bignall v. State*, 887 S.W.3d 21, 24 (Tex. Crim. App. 1994)).

The cases relied upon by the intermediate-appellate court, *Saunders* and *Masterson*, cautioned against the reasoning used by the intermediate-appellate court.

Saunders, a murder case, concerned the denial of a requested-lesser-included offense. In *Saunders*, the defendant received a lesser-included offense of involuntary manslaughter but the trial court refused to issue a lesser-included offense of criminally negligent homicide. *Saunders*, 913 S.W.2d at 565. This Court affirmed the decision but cautioned, "It is not invariably true that the jury's rejection of one lesser included offense will render harmless the trial court's failure to authorize the jury to convict of another lesser included offense also raised by the evidence." *Id*. at 572.

In *Masterson*, which relied on *Saunders*, this Court cautioned further that, "the [bare] existence of an instruction regarding an intervening lesser offense does not automatically foreclose harm—because in some circumstances that intervening lesser offense may be the least plausible theory under the evidence. . ." *Masterson*, 155 S.W.3d at 171.

This case exemplifies this Court's admonishments from *Masterson* and *Saunders*. Specifically, here, the majority disregarded this Court's admonishments and, instead, concluded that if the jury decided not to convict Appellant of manslaughter for a "reckless" act that the jury would have never convicted Appellant of felony-deadly conduct a "knowing" act. [Majority, 52-55]. According to the

majority, "manslaughter was just as plausible a theory as deadly conduct," but such a conclusion is untenable. *Saunders*, 913 S.W.2d at 565; *Masterson*, 155 S.W.3d at 171. Instead, here, as in the admonishment from *Masterson*, manslaughter was "less plausible under the evidence" than felony-deadly conduct. TEX. PENAL CODE § 22.05(b). The majority reasoned that because the mental state for manslaughter was "less" than the mental state for felony-deadly conduct that a jury would have never convicted the appellant of the felony-deadly conduct, because felony-deadly conduct has a "higher" mental state than manslaughter. This reasoning is unpersuasive because the evidence strongly suggested that Braughton acted with the "higher" mental state of "knowingly" and, if a juror believed that Braughton acted "knowingly" but not "recklessly," then the juror either had to acquit Braughton, convict him of murder, or to disregard the jury charge and convict him of the lesser-included offense of manslaughter.

This is precisely the circumstance that Court warned against in *Saunders* and *Masterson*. *Saunders*, 913 S.W.2d at 572; *Masterson*, 155 S.W.3d at 171. Here, a juror, operating under this charge, who believed that Braughton acted "knowingly" would have been foreclosed from convicting him of manslaughter and instead required to elect between convicting him of murder or acquitting him—exactly what this Court has sought to avoid. For these reasons the error was harmful.

V. Conclusion

Accordingly, Braughton asks this Court to reverse the intermediate-appellate court's opinion, to conclude that the trial court erred in not granting the requested-lesser-included offense and to remand this case for a new trial.

13. Conclusion and Prayer

The intermediate-appellate court erred when it affirmed the judgment and sentence. Accordingly, Appellant asks this Court to find:

1) that the evidence established that he acted in self-defense and to reverse the trial court's judgment and the opinion from the intermediate-appellate court, and to render a verdict of acquittal because Braughton's conduct was justified;

2) in the alternative, that the intermediate-appellate court erred in concluding that the trial court's refusal to issue the requested-lesser-included offense was harmless and to reverse the opinion of the intermediate-appellate court and the judgment of the trial court and the remand this case for a new trial;

3) in the alternative, that the intermediate-appellate court erred in concluding that the trial court's refusal to issue the requested-lesser-included offense was harmless and to reverse the opinion of the intermediate-appellate court and the judgment of the trial court and the remand this case to the intermediate-appellate court for a full evaluation of Appellant's third issue consistent with the opinion from this Court; and,

4) any other relief that Appellant is entitled to.

Respectfully Submitted,

/s/ Niles Illich

Niles Illich
SBOT: 24069969
Law Office of Niles Illich, Ph.D., J.D.
701 Commerce
Suite 400
Dallas, Texas 75202
Direct: (972) 802−1788
Facsimile: (972) 236−0088
Email: Niles@appealstx.com

CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Rule 9.8 of the Texas Rules of Appellate Procedure because it is computer generated and does not exceed 15,000 words. Using the word count feature included with Microsoft Word, the undersigned attorney certifies that this brief contains 15,082 words. The sections exempted by Rule 9.4(i)(1) contain 2297 words. Therefore, under Rule 9.4(i)(1) the brief contains 12,785 words. This brief also complies with the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font for the text and 12-point Times New Roman font for the footnotes.

/s/ Niles Illich
Niles Illich

CERTIFICATE OF SERVICE

This is to certify that on January 22, 2018 that a true and correct copy of this brief was served on lead counsel for all parties in accord with Rules 9.5 and 68.11 of the Texas Rules of Appellate Procedure. Service was accomplished through an electronic commercial delivery service as follows:

Melissa Stryker
Harris County District Attorney's Office
1201 Franklin Street
Suite 600
Houston, Texas 77002-1923
Email: STRYKER_MELISSA@dao.hctx.net
Counsel for the State

Stacey Soule
State Prosecuting Attorney
P.O. Box 13046
Austin, Texas 78711
Email: information@spa.texas.gov
Counsel for the State

Brady Thomas Wyatt, III
Law Office of Brady T. Wyatt, III
3300 Oak Lawn Ave., Suite 600
Dallas, Texas 75219
Email: Attywyatt@hotmail.com
Counsel for the National Rifle Association of America, Inc.

David H. Thompson
John D. Ohlendorf
Haley N. Proctor
Cooper & Kirk, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
Email: dthompson@cooperkirk.com
Counsel for the National Rifle Association of America, Inc.

Sean Patrick Healy
Healy Law Offices, P.C.
113 E. Houston Street
Tyler, Texas 75702-8130
Email: genghis@healylaw.com
Counsel for the Texas State Rifle Association

/s/ Niles Illich
Niles Illich

Appendix

Table of Contents:

Exhibit A

Opinion issued April 20, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00393-CR

CHRISTOPHER ERNEST BRAUGHTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1389139

OPINION ON REHEARING

We issued our original opinion in this case on December 29, 2016. Appellant, Christopher Braughton, filed a motion for rehearing. We overrule the motion for rehearing, withdraw our previous opinion, and issue this substitute opinion. The disposition remains the same.

Chris Braughton, age 21, shot Emmanuel Dominguez, age 27, on the street outside Chris's parents' home at approximately 10:00 p.m. The shooting followed an episode of road rage between Dominguez and Chris's father, Christopher Braughton Sr., age 40, while Braughton Sr. was driving home with his wife and other son, age 13. According to the statement of Chris's mother, Dominguez "cut us off and then pulled up beside us and followed us home." Although many of the events after that point are disputed, it is undisputed that Dominguez and Braughton Sr. engaged in a physical altercation in which Dominguez punched Braughton Sr., that Chris ran out of the house brandishing a gun in an attempt to protect his father, and that the fight stopped at least momentarily when Dominguez knocked Braughton Sr. to the ground and Chris first spoke. The evidence is mixed on whether Dominguez said he had a gun, but the evidence is undisputed that no gun was found on Dominguez or within his reach and that Chris aimed his gun at Dominguez and shot him once, killing him.

A jury found Chris guilty of murder and assessed his punishment at 20 years' confinement.[1] In three issues, Chris argues that (1) the evidence is legally insufficient to establish that he had the required mental state to commit murder; (2) the evidence is legally insufficient to reject his claims of self-defense and defense of others; and (3) the trial court committed reversible error by denying his

[1] *See* TEX. PENAL CODE § 19.02(b)(1)–(2).

request to provide an instruction in the jury charge on the lesser-included offense of deadly conduct.

We affirm.

Background

A. The Braughton family encounters Dominguez

Emmanuel Dominguez, the complainant, was a United States Marine, preparing to leave the Marine Corps and using up his vacation time until his discharge. In early May 2013, Dominguez moved to Spring, Texas and rented a house with his girlfriend, Jessica Cavender, who was also a United States Marine and had recently been assigned as a recruiter in Conroe, Texas. Their house was on Greenland Oak Court.

On May 24, 2013, Dominguez and Cavender went to a restaurant, where they ate, drank beer, and socialized. While there, they met another Marine who invited them to an icehouse, where they continued drinking. Sometime later, yet another veteran invited them to a karaoke bar, where they continued socializing and drinking. While at the karaoke bar, Dominguez and Cavender got into a verbal disagreement, and Cavender refused to accompany him to their home. Dominguez, who was intoxicated, left alone on his motorcycle.[2]

[2] At the time of his death, Dominguez had a blood alcohol concentration of 0.17 grams per deciliter, which is more than twice the statutory limit of 0.08 grams per

That same evening, Chris's father ("Braughton Sr."), mother ("Mrs. Braughton"), and younger brother were dining out while Chris, age 21, stayed home at his parents' house. The Braughtons, like Dominguez, lived on Greenland Oak Court, but Chris had never met Dominguez. After dinner, at approximately 10:00 p.m., Braughton Sr. began driving home, with Mrs. Braughton and their younger son riding in the family vehicle.

Braughton Sr. testified that, as they were nearing their home, he was driving approximately 15 to 18 miles per hour in an area with a 20-mile-per-hour speed limit when he saw a "big bright light" immediately behind his vehicle. He testified that he then heard "a really loud revving sound," and then a vehicle alarm alerted that there was an object very close to the vehicle's rear bumper. He determined from the light, the engine sound, and the vehicle's alarm that a motorcycle was very close behind his car.

According to Braughton Sr., Dominguez, who was driving the motorcycle, came around the side of the car, "tried to swerve into the side of the car," then came around the front of the car and "slam[med] on his brakes." The vehicle's proximity sensors again sounded. Braughton Sr. "slam[med]" on his own brakes to avoid hitting the motorcycle, then sped around the motorcycle and continued

---

deciliter for driving while intoxicated. *See* TEX. PENAL CODE §§ 49.01(2)(B), 49.04(a).

heading home. Dominguez followed the Braughton family onto Greenland Oak Court, where, unknown to either driver, they both lived.

As the Braughtons approached their house in their vehicle, Mrs. Braughton called Chris and told him they were being chased. Braughton Sr. testified that his wife said, "Son, there's a guy chasing us. I'm scared," while Mrs. Braughton recalled saying, "Son, this guy is chasing us. We are right by the house." The call lasted less than seven seconds, and Mrs. Braughton did not tell Chris to come outside, arm himself, or indeed to do anything at all. Braughton Sr. and Mrs. Braughton testified that they believed that Dominguez was attempting to rob or carjack them. No one, however, called either 9-1-1 or a non-emergency police line at that time.

According to Braughton Sr., the motorcycle "start[ed] coming around the car" again and blocked the Braughtons' driveway. Braughton Sr. drove around the cul-de-sac at the end of Greenland Oak Court, stopping on the opposite side of the street from his home. Dominguez stopped his motorcycle near the driveway to the home of Robert Bannon, who lived in the home between the Braughton residence and the house rented by Dominguez. Bannon, who was sitting in his driveway at the time, noticed that the motorcycle was only one or two feet away from the Braughtons' car and "thought [Dominguez] didn't know how to drive a motorcycle because he looked like he was kind of wobbling." Dominguez dismounted or fell

off the motorcycle without engaging the kickstand, and then he either threw down the motorcycle or let it fall to its side in the street.

B. Braughton Sr. and Dominguez confront each other

According to Glen Irving, a neighbor who witnessed the events, Dominguez "rather quickly" approached the Braughtons' car, and Braughton Sr. got out of his vehicle. But according to Bannon, Braughton Sr. "quickly" got out of the car and "immediately yelled" at Dominguez, demanding to know, "Why the f___ you following me so close for?" Both Bannon and Irving testified that the two men yelled and swore at each other. Irving also testified that Dominguez began punching Braughton Sr. in his face and "beating him up," while Braughton Sr. attempted to defend himself.

Braughton Sr. testified that, while these events were unfolding, he was yelling to his wife, "Get inside," and, "Call 9-1-1," at which point Dominguez began punching him. Braughton Sr. testified that Dominguez hit him two or three times. Dominguez then knocked Braughton Sr. to the ground. This altercation occurred closer to the motorcycle than to the Braughtons' car.[3]

Meanwhile, Chris, who was inside the Braughtons' home, had run to the front door and heard a "loud motorcycle noise." He went to his parents' bedroom,

[3] Two independent witnesses, Bannon and "Gina" (a pseudonym, as stated in note 4, *infra*), did not see any physical fight between Braughton Sr. and Dominguez. A photograph taken by police showed Braughton Sr. with a bloody lip.

where he kept a 9-millimeter handgun that he had purchased approximately three months earlier. He retrieved the gun and the magazine, which was kept separately, inserted the magazine into the gun, and pulled back the slide to chamber a bullet. At this point, according to Chris, the safety mechanism on the gun was disengaged and the gun was ready to fire.

During the altercation between Dominguez and Braughton Sr., Chris came out of his parents' house with the loaded gun, saw Dominguez hitting Braughton Sr., and said two or three times, "I have a gun," or, "Stop, I have a gun." Chris testified that, when he left the house, he had not seen or heard that anyone outside had a weapon of any kind and did not know who had started the fight. There is no evidence in the record that Chris knew that a physical fight was underway before he left the house with a gun. And Chris conceded at trial that the fight was closer to the motorcycle than to the car, indicating that his father had moved farther than had Dominguez. Braughton Sr. did not see Chris exit the house; rather, he first saw him when Chris was three feet away from Dominguez, pointing the gun at Dominguez. According to Mrs. Braughton's sworn statement, she said around this time, "Chris, go, you know, take the gun inside. Take the gun inside."

C. Dominguez reacts to the gun

Witnesses at trial gave conflicting accounts of what happened next. Chris, Braughton Sr., Mrs. Braughton, and Irving all testified that Dominguez then

verbally responded to Chris and either moved toward or reached into the saddlebags on the motorcycle. The details of their testimony, however—whether Dominguez indicated that he had a gun and whether he actually reached his motorcycle, which was some unspecified distance away from the fight—conflicted. Specifically, Chris testified that Dominguez said, "Oh, you have a gun, m_____f____. I have a gun for you," then reached into a saddlebag on the motorcycle. He later testified, however, that Dominguez used the word "something," not "a gun."

According to Braughton Sr., Dominguez "reache[d] down and he [said], 'You got a gun, m_____f_____, I have something for your f_____ a__.'" Elsewhere in his testimony, however, Braughton Sr. recalled that Dominguez said "gun," not "something." Braughton Sr. specifically testified that Dominguez "reache[d] in[to]" the saddlebag before he was shot.

Mrs. Braughton testified that Dominguez "reache[d] towards his bike, the boxes on his bike," and quoted him as saying, "You have a gun, m_____f_____. I have something for your a__." Elsewhere in her testimony, she reported the second sentence as, "I have a gun for your a__." She also testified that she saw Dominguez reaching toward his motorcycle while she was running into her home.

Neighbor Irving testified that Dominguez "turned and started back towards the motorcycle, and [Irving] heard a voice say, 'Yeah, I got a gun, too . . . .'" When

pressed to "recall exactly what [he] heard," Irving said that he heard either "I got a gun, too," or possibly, "I've got something for you . . . ." He testified that he could not "say 100 percent positively" which statement he heard. Although Irving testified that Dominguez moved toward the motorcycle, he did not see Dominguez reach into the saddlebags. He testified that, if Dominguez had done so, he "should have been able to see it" from his vantage point, but he could not "say positively that [he] would have seen it."

Chris testified that Dominguez was positioned with the saddlebag to his left, reached across his body with his right arm, turning as he did so, and began to straighten up. Similarly, Braughton Sr. testified that Dominguez reached toward a saddlebag on the motorcycle, "just grab[bed] the box and open[ed] it," then reached into it.

Gina,[4] a high-school junior who also lived on Greenland Oak Court, testified with a different account. Gina watched events unfold from her second-story bedroom window in a house across the street. Gina testified that she could not see many details of the scene "clearly" because a light-blocking screen on her window made her view of the street "blurry." She could not see faces clearly and did not see a gun, but testified that she heard Mrs. Braughton tell Chris, "Put the gun down." Gina further testified that, instead of complying, Chris replied, "No, I got a

[4] Because the witness was a minor at the time of the shooting, we use a pseudonym.

gun now," and walked toward Dominguez, who "stopped and put his hands up" and "slowly back[ed] up." Gina physically demonstrated the shooting at trial on direct examination, but the record does not reflect any testimony regarding the orientation of Dominguez's body with respect to either Chris or Chris's gun.[5] Gina did not see Dominguez approach the motorcycle, open a saddlebag, or reach for anything.

D. Chris kills Dominguez

The remaining sequence of events is undisputed. Chris testified that he "pointed [the gun] towards [Dominguez's] arm" without "aiming at a specific area on him" and pulled the trigger. He shot Dominguez one time. The bullet hit Dominguez under his right armpit, toward the back of his body. It traveled right to left, "very slightly upward," and "slightly back to front," puncturing both of Dominguez's lungs and damaging his "aorta, the major artery coming out from the heart," resulting in the loss of at least three liters of blood. The medical examiner who later examined Dominguez, Dr. Morna Gonsoulin, testified that such injuries can kill a person "within seconds."

---

[5] Chris argues that Gina's testimony "can only be read to say that Dominguez was facing [Chris] when the shot was fired," but she did not expressly give such testimony. The State acknowledges that Dominguez must have turned before he was shot. No witness expressly stated that Dominguez was facing Chris when or just before he was shot.

Dominguez fell to the ground. According to Gina, Mrs. Braughton then said to Chris, "What did you do?"

Mrs. Braughton dialed 9-1-1 on her cell phone and handed the phone over to Braughton Sr., who talked to dispatch. Braughton Sr. explained several times during the call that a man had chased his family and attacked him and that his son—that is, Chris—shot the attacker. He did not mention any verbal threats by Dominguez, nor did he say that anyone feared a carjacking or robbery at any time. Although Mrs. Braughton and Bannon attempted to perform CPR, Dominguez died on the scene. Chris placed the gun in the house, waited for the police, and identified himself as the shooter to police when they arrived at the scene.

The investigating officers took statements from a number of witnesses, including Gina. The officers made an audio recording of their interview with Gina. Sergeant A. Alanis of the Harris County Sheriff's Office testified that he attempted to take statements from Braughton Sr. and Mrs. Braughton, but both declined to give statements. Braughton Sr. testified that he attempted to write a statement, but an officer took away the clipboard that he was writing on. Mrs. Braughton gave a written statement in which she wrote that Dominguez "trie[d] to pull something out of his box on his bike" but did not mention any threats by Dominguez. At the time of the shooting, officers did not identify Irving as a witness.

E. Evidence at trial

The State charged Chris with murder. At trial, Gina testified that she did not have a relationship with or know the names of any of the individuals involved, although she recognized them as her neighbors and was able to associate them with their respective homes. She identified the participants by the color of the clothing that they wore on the night in question and their respective genders. Using those descriptions, she testified that she saw Braughton Sr. and Dominguez arguing when Chris came from the direction of the Braughtons' house "with his right arm stretched out with a gun in his hand." She testified that Chris "just walk[ed] straight to [Dominguez] and then he stop[ped]." Gina stated that Dominguez was backing up with his arms raised when Chris shot him.

Gina confirmed that her memory of events "would be better whenever I made the statement" to police on the night of the shooting than at trial and that everything she had said in her statement was true and correct. Her statement was admitted into evidence and played for the jury. In it, as at trial, she described the participants in the confrontation by clothing and gender, though she stated that the person in black—that is, Chris—argued and engaged in a shoving match with the person in red—that is, Dominguez. She stated that the person in black had a gun and shot the person in red one time. At trial, she testified that she had misspoken

and that the person in orange—that is, Braughton Sr.—was the person who had argued with Dominguez.

The State also presented testimony by Bannon, who testified that he did not "see anyone throw a punch or kick at each other," though he was "maybe 20 feet away" from the confrontation and had "a good view" of both men. Rather, he testified that Braughton Sr. and Dominguez were "[j]ust yelling." Bannon heard Chris say, "I have a gun," then heard a woman, possibly Mrs. Braughton, say, "'We're recording you,' or 'We're recording this.'" He testified that he "thought there was a fight about to break out" at the moment when Chris came out of the house. When Bannon saw that Chris had a gun, he went into his home to retrieve a rifle to "try to [defuse] the situation [and] have [Chris] put his gun down." He testified that he neither saw nor heard the shot being fired. By the time Bannon returned to his front door, Dominguez was lying on the ground, so Bannon went outside without the rifle.

The State called three investigating law enforcement officers: Corporal J. Talbert of the Constable's Office, Precinct 4; Sergeant Alanis; and Harris County Sheriff's Deputy D. Medina. All three had responded to the scene of the shooting. Corporal Talbert authenticated several photographs as fair and accurate representations of the scene as it appeared when he arrived. Several of these photographs show one of the two saddlebags on Dominguez's motorcycle open.

Deputy Medina testified that she found no gun or other weapons on Dominguez's person or in his saddlebags but that one of the saddlebags was open when she arrived on the scene.

Corporal Talbert specifically noted "a cell phone . . . towards the middle of the cul-de-sac." He testified, "Somebody tried to pick up the cell phone that was in the cul-de-sac" but he "told them to leave it where it was." Sergeant Alanis also testified that law enforcement collected a cell phone in the cul-de-sac and that he "was advised it was the defendant's father's." He also testified, "The father requested the phone back, and I told him it was going to be evidence until it was downloaded." By the time Alanis attempted to search the phone, it "had been wiped" and "appeared like when you buy a brand new phone." Alanis was not able to recover any information from the phone.

Dr. Gonsoulin, the assistant medical examiner who conducted Dominguez's autopsy, testified that Dominguez died from a single gunshot wound and that the path of the bullet went "basically from the right armpit to the left armpit." For the bullet to follow its trajectory, Dominguez had to have exposed his right armpit and had his left side slightly lower than the right when he was shot. According to Dr. Gonsoulin, this meant that Dominguez could have been shot while bending, reaching, or extending his right arm across his body toward his left side. She testified that the gun could not have been "straight ahead pointing" at Dominguez's

chest. Dominguez could have been shot while turning, but it was "impossible" for him to be "shot facing the shooter with his arms up." She also testified, however, that in general reaching down and across the body would not sufficiently expose the armpit, explaining, "There might be an angle where you could just be reaching down and [the wound area] would be exposed, but you would have to at least extend your shoulders slightly to get the differential in the arms." Dr. Gonsoulin's testimony was supported by photographic evidence showing that the gunshot wound was under Dominguez's right arm, an X-ray image showing the bullet inside the left side of Dominguez's chest, and the autopsy report describing the bullet's trajectory.

The State presented further testimony. Harris County Sheriff's Deputy F. Williams testified that he unsuccessfully attempted to recover video from the Braughtons' home security system. S. Williams, a forensic chemist, testified that Chris had gunshot residue on both of his hands when samples were taken shortly after the shooting. A firearms examiner testified regarding the operation of Chris's gun. A DNA analyst, Z. Phillips, testified that she found DNA consistent with Braughton Sr.'s DNA on a knuckle on Dominguez's right hand but did not find any DNA consistent with Chris's DNA on Dominguez.

The State presented testimony from Cavender regarding her relationship with Dominguez, their move to Spring, and the time they spent together the day

Dominguez died. Cavender testified that Dominguez did not have any weapons on his person or on his motorcycle on the day he died. Her phone and keys were in the motorcycle's saddlebags at the time of the shooting.

The defense presented testimony from Glen Irving, Braughton Sr., and Mrs. Braughton that Dominguez was chasing the Braughtons erratically down the street and riding "almost on [their] bumper." The Braughtons all testified that Mrs. Braughton frantically called Chris while Dominguez was chasing them. Irving and the Braughtons testified that Dominguez and Braughton Sr. fought. According to Irving, Dominguez was "punching and beating up" Braughton Sr. The Braughtons each testified that at that time they were afraid for their lives. Irving and the Braughtons testified that Chris warned Dominguez as the latter was hitting Braughton Sr., "Stop, I have a gun." They all testified that Dominguez knocked down Braughton Sr. and went toward his motorcycle, cursing and threatening that he had "a gun" or "something for" Chris. Each of these witnesses also testified, however, that they never saw a gun or other weapon in Dominguez's possession.

Braughton Sr. testified that he lost his phone on the evening in question. Specifically, he testified that it fell out of his back pocket when Dominguez punched him. He testified that the police took the phone and that the Braughtons "kept asking" where the phone was but that they never regained possession of it. Mrs. Braughton tracked the phone belonging to her youngest son, which was also

missing, using an app on her own phone and found that it was "on the next street and was driving away." An officer returned with that phone but said he did not have Braughton Sr.'s phone. According to Braughton Sr., when the Braughtons tracked his phone, they found that it was in Pasadena, assumed it was stolen, and remotely reset it to its factory state.

The defense also presented Gary Gross, who installed the solar screen in Gina's bedroom window. He testified that the screen was a "90 percent Suntex solar screen," meaning that it would "block 90 percent of visible light," was designed to provide privacy, and would be difficult to see through at night. According to Gross, at 10:00 p.m., it would be possible to see "some visible light" through the screen and to "see something," but not to "make out what it is." He confirmed that it would "probably not" be possible for anyone looking through the screen at that time to "make out what they are seeing."

Chris testified that he "was just pointing [the gun] at [Dominguez's] arm" and "just wanted to stop him." According to Chris, he had the gun in the air initially, but he brought it down to his hip to fire. He testified that is not the same way that he would "fire at a gun range." He testified that he was "[n]ot behind [Dominguez but] on the side of him" when he fired the shot. He conceded that he pointed the gun at Dominguez, pulled the trigger, and thought "that a bullet was going to hit" Dominguez. He also testified as follows:

Q. You're aware that a bullet hitting somebody can cause serious bodily injury, correct?

A. Sometimes, yes, sir.

Q. So you were aware that—you were aware that you were intending to cause serious bodily injury to Manny Dominguez?

A. Yes, sir.

He also explained that he had "receive[d] some basic information about the operation of the gun" from the salesperson and had fired it at a shooting range on two occasions.

The trial court charged the jury, instructing it on the offense of murder and the lesser-included offense of manslaughter. Additionally, the trial court instructed the jury on the law of self-defense, defense of a third person, and defense of property. Chris requested that the trial court also include an instruction on the lesser offenses of misdemeanor and felony deadly conduct, but the trial court refused.

The jury convicted Chris of murder and assessed his punishment at 20 years' confinement. This appeal followed.

Sufficiency of the Evidence

In his first two issues, Chris argues that the evidence was legally insufficient to support his conviction. In the first issue, he argues that no evidence, whether direct or circumstantial, establishes that he possessed the required mental state to

commit murder. In the second issue, he argues that the evidence was insufficient to prove beyond a reasonable doubt that he did not act in self-defense or in defense of others.

A. Standard of review

When reviewing the sufficiency of the evidence, we view all of the evidence in the light most favorable to the prosecution to determine whether any rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011) (holding that *Jackson* standard is only standard to use when determining sufficiency of evidence); *Nelson v. State*, 405 S.W.3d 113, 122 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). The jury is the exclusive judge of the facts and the weight to be given to the testimony. *Bartlett v. State*, 270 S.W.3d 147, 150 (Tex. Crim. App. 2008). A jury, as the sole judge of credibility, may accept one version of the facts and reject another, and it may reject any part of a witness's testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986); *see also Henderson v. State*, 29 S.W.3d 616, 623 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) ("Even when a witness's testimony is uncontradicted, the jury can choose to disbelieve a witness.").

We afford almost complete deference to the jury's credibility determinations. *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008). We may not re-evaluate the weight and credibility of the evidence or substitute our judgment for that of the factfinder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007) (citing *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999)). Rather, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014). We resolve any inconsistencies in the evidence in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000); *see Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) ("When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination.").

Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt. *Sorrells v. State*, 343 S.W.3d 152, 155 (Tex. Crim. App. 2011); *Clayton*, 235 S.W.3d at 778. "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.

Crim. App. 2007). "Evidence is legally insufficient when the 'only proper verdict' is acquittal." *Nelson v. State*, 405 S.W.3d 113, 122 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (quoting *Tibbs v. Florida*, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2218 (1982)).

The jury's ultimate conclusion must be rational in light of all the evidence. *See, e.g.*, *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Matlock v. State*, 392 S.W.3d 662, 673 n.45 (Tex. Crim. App. 2013); *Adames*, 353 S.W.3d at 860; *Nelson*, 405 S.W.3d at 122–23. In reviewing the sufficiency of the evidence when a jury has rejected claims of self-defense or defense of others, we must "determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of murder beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt." *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991).[6] When some evidence, if believed, supports a self-defense claim, but other evidence, if believed, supports a conviction, we, as an appellate court, "will not weigh in on this fact-specific determination, as that is a function

[6] We agree with the dissent's summary of this standard as requiring us to determine whether it was "rational *both* for the jury to have found appellant guilty of murder, looking at the evidence in the light most favorable to the verdict, *and* for it to have rejected the defenses of self-defense and defense of a third person." Accordingly, we consider whether the jury could rationally have made both such findings, taking all the evidence in the light most favorable to the prosecution.

reserved for a properly instructed jury." *Reeves v. State*, 420 S.W.3d 812, 820 (Tex. Crim. App. 2013).

B. Mens rea

In his first issue, Chris argues that the evidence was insufficient to support a finding that he possessed the required mental state to have committed the offense of murder.

1. Applicable law

A person has the requisite mens rea for the offense of murder when he "intentionally or knowingly causes the death of an individual" or "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." TEX. PENAL CODE § 19.02(b)(1)–(2). A person acts "intentionally" with respect to the nature or result of his conduct "when it is his conscious objective or desire to engage in the conduct or cause the result." *Id.* § 6.03(a). A person acts "knowingly" "with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result." *Id.* § 6.03(b). When, as in this case, the charge presents two legal theories of murder—knowingly causing death or intending to cause serious bodily injury and committing an act clearly dangerous to human life that causes death—the theories are alternative manners and means of committing the offense of murder, rather

than distinct offenses. *See Aguirre v. State*, 732 S.W.2d 320, 326 (Tex. Crim. App. 1982) (en banc) (op. on rehearing).

A conviction may be based upon circumstantial evidence, which is just "as probative as direct evidence in establishing the guilt of an actor." *Temple v. State*, 390 S.W.3d 341, 359 (Tex. Crim. App. 2013) (quoting *Hooper*, 214 S.W.3d at 13). As explained by the Court of Criminal Appeals, "a jury may infer intent from any facts which tend to prove its existence . . . [and a] jury may also infer knowledge from such evidence." *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) (quoting *Manrique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999)). This evidence may include acts, words, and conduct of the accused. *Id.*; *see Robbins v. State*, 145 S.W.3d 306, 309 (Tex. App.—El Paso 2004, pet. ref'd) ("[T]he jury may infer the intent to kill from the defendant's words or conduct.").

Further, a "jury may infer the intent to kill from the use of a deadly weapon unless it would not be reasonable to infer that death or serious bodily injury could result from the use of the weapon." *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996); *see Pitonyak v. State*, 253 S.W.3d 834, 844 (Tex. App.—Austin 2008, pet. ref'd) ("When, as in this case, the evidence shows that a deadly weapon was used in a deadly manner, 'the inference is almost conclusive that [the defendant] intended to kill.'" (quoting *Godsey v. State*, 719 S.W.2d 578, 581 (Tex. Crim. App. 1986))). A firearm is a deadly weapon *per se*. TEX. PENAL CODE

§ 1.07(a)(17)(A). In consideration of the evidence, "[i]ntent may also be inferred from the means used and the wounds inflicted, and is a factual matter to be determined by the jury from all the facts and circumstances." *Ervin v. State*, 333 S.W.3d 187, 200 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

2. Whether there is sufficient evidence that Chris possessed the required mental state

The State and Chris agree—and Chris testified—that he came out of the house with a gun and ultimately shot Dominguez with a firearm, killing him. Chris does not challenge the evidentiary support of these undisputed facts. Rather, Chris points to the following evidence to argue there was no mens rea evidence: (1) Chris feared for his father's safety upon seeing the fight; (2) he pointed the gun in the air and told Dominguez to stop because he had a gun; (3) Dominguez threatened to pull a gun on him; (4) the forensic examiner testified that Chris shot Dominguez at an angle, not facing face-to-face; (5) Chris testified that the only reason that he discharged the gun was "to stop" Dominguez; and (6) Chris did not flee the scene but instead waited for the police, voluntarily identified himself as the shooter and directed the police to the gun he used.

But this evidence is not relevant to the mental state of intent to kill or cause serious bodily injury; rather, it supports his defenses of self-defense and defense of another person. The evidence shows that Chris came out of the house with a loaded weapon and inserted himself into a dispute between Braughton Sr. and Dominguez

in which no deadly force had been used or threatened and which had not caused any serious injury to his father. And he ultimately fired that gun with the intention of striking Dominguez. The "jury [could] infer the intent to kill from the use of a deadly weapon unless it would not be reasonable to infer that death or serious bodily injury could result from the use of the weapon." *Jones*, 944 S.W.2d at 647; *see Pitonyak*, 253 S.W.3d at 844.

Chris also argues that evidence about his cooperation with police after the shooting coupled with a lack of prior animosity between the two demonstrates insufficient circumstantial evidence of the requisite mental state for murder under Penal Code sections 19.02(b)(1) and 19.02(b)(2). But Chris used a firearm, a deadly weapon *per se*, to kill Dominguez. TEX. PENAL CODE § 1.07(a)(17)(A). Intent is determined by the jury from all the facts and circumstances in evidence. *Ervin*, 333 S.W.3d at 200. Thus, purposeful use of a deadly weapon could reasonably lead a jury to conclude that Chris possessed the required mental state. *See id*; *Jones*, 944 S.W.2d at 647; *Pitonyak*, 253 S.W.3d at 844.

To support his contention that the jury reached an irrational conclusion here, Chris points to the "robbery-at-a-convenience-store" illustration in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010) (plurality op.). The court explained the hypothetical as follows:

> The store clerk at trial identifies A as the robber. A properly authenticated surveillance videotape of the event clearly shows that B

> committed the robbery. But, the jury convicts A. It was within the jury's prerogative to believe the convenience store clerk and disregard the video. But based on *all* the evidence the jury's finding of guilt is not a rational finding.

323 S.W.3d at 906–07 (quoting *Johnson v. State*, 23 S.W.3d 1, 15 (Tex. Crim. App. 2000) (McCormick, P.J., dissenting)). The *Brooks* court identified this example as "a proper application of the *Jackson v. Virginia* legal-sufficiency standard." *Id.*

This case is not analogous. There is no evidence that "clearly" contradicts the jury's conclusion that Chris killed Dominguez with the requisite intent. Nor does a review of all the evidence in the light most favorable to the verdict demonstrate that the jury's finding was irrational. Even were we to agree with Chris that the medical examiner's findings regarding the trajectory of the gunshot—the bullet traveling from one armpit to the other—were incontrovertible and that Gina's testimony regarding Dominguez's orientation could be completely disregarded because it conflicted with those findings, the jury rationally could have concluded that Chris acted with the required culpable mental state for murder. And Chris himself acknowledges that there is some evidence indicating a culpable mental state, such as his use of a firearm at close range and his own acknowledgments that he was "intending to cause serious bodily injury to" Dominguez.

Viewing the evidence in the light most favorable to the jury's finding, we conclude that a rational jury could have found that Chris intentionally or knowingly caused Dominguez's death. *See Jackson*, 443 U.S. at 319; *see also* TEX. PENAL CODE §§ 6.03(a)–(b) (definitions of "intentionally" and "knowingly"), 19.02 (elements of murder). The evidence is thus legally sufficient to support the jury's finding that Chris acted with the required mental state to commit murder. We overrule Chris's first issue.

C. Defenses of self-defense and defense of others

In his second issue, Chris argues that "the State failed to carry its burden of persuasion on his claims that he acted in self-defense and in defense of others."

1. Applicable law

Both self-defense and defense of a third party are statutorily defined and provide a defense to prosecution when the conduct in question is "justified." TEX. PENAL CODE § 9.02. Under Chapter 9, "a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force . . . ." *Id.* § 9.31(a). Similarly, "[a] person is justified in using *deadly* force against another . . . when and to the degree the actor reasonably believes the deadly force is immediately necessary . . . to protect the actor against the other's use or attempted use of unlawful deadly force." *Id.* § 9.32(a) (emphasis

added); *see Smith v. State*, 355 S.W.3d 138, 145 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd).

A person is justified in using deadly force in defense of others "[s]o long as the accused reasonably believes that the third person would be justified in using [deadly force] to protect himself." *Smith*, 355 S.W.3d at 145 (quoting *Hughes v. State*, 719 S.W.2d 560, 564 (Tex. Crim. App. 1986)); *see* TEX. PENAL CODE § 9.33. Both of these defenses—self-defense and defense of others—may be raised as justifications for a defendant's actions and in support of an acquittal against a charge of murder or manslaughter. *See, e.g.*, TEX. PENAL CODE §§ 9.31–.33; *Alonzo v. State*, 353 S.W.3d 778, 779–81 (Tex. Crim. App. 2011) (self-defense is defense to both murder and manslaughter charges); *Smith*, 355 S.W.3d at 145 (defense of third person as defense to murder).

The use of force against another is not justified in response to verbal provocation alone[7] or when the person using force provoked the person against whom the force was used.[8] And the use of deadly force is only appropriate under these defenses to protect the actor or a third person from another's "use or attempted use of unlawful deadly force" or "to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery." *See* TEX. PENAL CODE §§ 9.32(a), 9.33.

---

[7] *See* TEX. PENAL CODE § 9.31(b)(1).

In a claim of self-defense or defense of others, "a defendant bears the burden of production," while "the State . . . bears the burden of persuasion to disprove the raised defense." *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003). The defendant's burden of production requires the defendant to adduce some evidence that would support a rational jury finding for the defendant on the defensive issue. *See Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013); *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007); *see also* TEX. PENAL CODE § 2.03(c) ("The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense."). "[E]ven a minimum quantity of evidence is sufficient to raise a defense as long as the evidence would support a rational jury finding as to the defense." *Krajcovic*, 393 S.W.3d at 286 (citing *Shaw*, 243 S.W.3d at 657–58). "[A] defense is supported (or 'raised') if there is evidence in the record making a prima facie case for the defense." *Shaw*, 243 S.W.3d at 657. "A prima facie case is that 'minimum quantum of evidence necessary to support a rational inference that [an] allegation of fact is true.'" *Id.* (quoting *Tompkins v. State*, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987), *aff'd*, 490 U.S. 754, 109 S. Ct. 2180 (1989)). By contrast, the State's "burden of persuasion is not one that requires the production of evidence, rather it requires

---

[8] *See id.* § 9.31(b)(4) (providing general rule and exception).

only that the State prove its case beyond a reasonable doubt." *Zuliani*, 97 S.W.3d at 594 (citing *Saxton*, 804 S.W.2d at 913–14).

In light of these burdens of production and proof, "[w]hen a jury finds the defendant guilty, there is an implicit finding against the defensive theory." *Id.* A jury, however, is not permitted to reach a speculative conclusion. *Elizondo v. State*, 487 S.W.3d 185, 203 (Tex. Crim. App. 2016). Nor is it permitted to disregard undisputed facts that allow only one logical inference. *Evans v. State*, 202 S.W.3d 158, 162 (Tex. Crim. App. 2006); *Satchell v. State*, 321 S.W.3d 127, 132 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

2. Whether there is sufficient evidence that Chris's actions were not justified

Chris adduced evidence that he acted in self-defense or in defense of his family. According to multiple witnesses, Chris received a frantic phone call from his mother that Dominguez was chasing his family on a motorcycle. By several accounts, when Chris came out of the house, Dominguez was punching Braughton Sr. in the face. Braughton Sr. ultimately had a bloody lip. Chris relies on his own testimony and the testimony of his family members and Irving that when he came out of the house with a gun and told Dominguez, "Stop, I have a gun," Dominguez responded by acknowledging, "[Y]ou have a gun," stating that he had "a gun" or "something for" Chris, and moving towards his motorcycle, which prompted Chris to shoot him. In addition, Bannon testified that the overall situation was one in

which Chris was "just trying to defend his dad." This testimony was consistent with the physical evidence presented. As Dr. Gonsoulin testified, the bullet trajectory was at least plausibly consistent with a shot fired while Dominguez was bending or reaching downward with his right hand, as that would expose his armpit if his shoulders were sufficiently extended.

In light of the above testimony, Chris met his burden of production. *See* TEX. PENAL CODE § 2.03(c); *Krajcovic*, 393 S.W.3d at 286; *Shaw*, 243 S.W.3d at 657–58. That is, this evidence, if credited by the jury, would support a rational jury finding that Chris was not guilty because (1) he justifiably acted in self-defense in response to the statement "I got a gun for you" and Dominguez's subsequent motions; (2) he justifiably acted in defense of others, in particular in defense of his father, mother, and younger brother; or (3) both defenses applied.

Because Chris met his burden of production, the State was required to prove beyond a reasonable doubt that his actions were not justified under either defensive theory. *Zuliani*, 97 S.W.3d at 594; *Saxton*, 804 S.W.2d at 913–14. Although the State was not required to produce evidence refuting Chris's theories, it still had the obligation to present evidence sufficient to permit the jury to reach its verdict of guilty, implicitly rejecting those theories. *E.g.*, *Alonzo*, 353 S.W.3d at 781 ("If there is some evidence that a defendant's actions were justified under one of the provisions of Chapter 9 [of the Penal Code], the State has the burden of persuasion

to disprove the justification beyond a reasonable doubt."); *Zuliani*, 97 S.W.3d at 594–95; *Saxton*, 804 S.W.2d at 913–14.

The jury rationally could have rejected Chris's self-defense and defense-of-others theories. The use of deadly force for defense of third parties is justified only "when and to the degree the actor reasonably believes the deadly force is immediately necessary . . . to protect the [third party] against [another's] use or attempted use of unlawful deadly force." TEX. PENAL CODE §§ 9.32(a)(2), 9.33. Taking the evidence in the light most favorable to the prosecution, the jury could have discredited the testimony that Mrs. Braughton called Chris before the fight began—testimony that was undermined by the absence of any phone records demonstrating that it occurred or any data retrieved from any phone found at the scene. Although no witness testified that the call did not occur, the jury was free to disbelieve all or any part of any witness's testimony and was not required to accept the testimony of Chris's witnesses, even when those witnesses were not contradicted. *See Sharp*, 707 S.W.2d at 614; *Henderson*, 29 S.W.3d at 623.

In the same light, the cut on Braughton Sr.'s lip and presence of Braughton Sr.'s DNA on Dominguez's hand indicates only that Dominguez punched Braughton Sr. once. Even were we to credit the testimony of Braughton Sr. that he was punched three times, the jury rationally could have concluded that Chris's use of deadly force was not immediately necessary for Chris to protect his father. By

all accounts, Braughton Sr. was on the ground after the third punch, and Dominguez had no weapon, was not using his hands as deadly weapons, and was not kicking or jumping on Braughton Sr. And Braughton Sr.'s injuries—a bloody lip—were not serious—indeed, Braughton Sr. did not receive any medical treatment for his injuries. The defense-of-others theory is also undermined by Chris's mother's statement to him to put the gun down and go back inside and her immediate reaction to observing Chris shoot Dominguez: "What did you do?"

Indeed, at the moment of the shooting, Dominguez had ceased using any force at all, and the punches he had landed on Braughton Sr. up to that point do not amount to deadly force that could create a reasonable belief that deadly force was necessary. *See Bedolla v. State*, 442 S.W.3d 313, 317 (Tex. Crim. App. 2014) (distinguishing between purportedly defensive punching as force and running over victim with car as deadly force); *see also Bundy v. State*, 280 S.W.3d 425, 435 (Tex. App.—Fort Worth 2009, pet. ref'd) (stating that "attempt to punch appellant . . . was not deadly force" justifying defensive deadly force); *Schiffert v. State*, 257 S.W.3d 6, 14 (Tex. App.—Fort Worth 2008, pet. ref'd) (holding that reasonable jury could not have found that actor was justified in using deadly force when other person's only use of force was striking with fist); *cf. Rue v. State*, No. 01-11-00112-CR, 2012 WL 3525377, at *3 (Tex. App.—Houston [1st Dist.] Aug. 16, 2012, pet. ref'd) (mem. op., not designated for publication) ("Hands are

not deadly weapons per se, but they can become deadly weapons depending on how the actor uses them."). In sum, Chris adduced no evidence that Dominguez used his hands in a deadly manner or used or threatened to use deadly force of any kind before Chris brought a gun to the encounter.

We next turn to whether the jury likewise could have rationally found that Chris was not justified in using deadly force in light of evidence that Dominguez appeared to be reaching for a gun in the saddlebag of his motorcycle. Chris, Braughton Sr., and Mrs. Braughton each testified that, in response to Chris's announcement that he had a gun, Dominguez responded that he also had "a gun." But each of these witnesses also testified that Dominguez might have said, instead, that he had "something." No witness ever saw a gun in Dominguez's possession, and law enforcement did not recover any weapon other than Chris's gun. Thus, although the jury could have credited testimony that Chris reasonably believed that deadly force was immediately necessary, it was also free to reject the testimony that Dominguez threatened Chris with and attempted to retrieve a gun, particularly when no gun other than Chris's was ever recovered. *Saxton*, 804 S.W.2d at 914.

Chris next assails the testimony of Gina, the neighbor who observed the events unfold from her bedroom window. First, Chris points out inconsistencies between her statement to police and her trial testimony. Second, he argues that her testimony is unreliable because the window covering obstructed her vision. Third,

through his examination of Dr. Gonsoulin, the assistant medical examiner, he attacks Gina's contention that Dominguez was backing up with his arms raised above his head and was not reaching towards his motorcycle's saddlebag when he was shot. Dr. Gonsoulin conceded that—given the path of the bullet which went "basically from the right armpit to the left arm pit" in a "very slightly upward" direction[9]—it was "possible" that Dominguez was "slightly bent" and "reaching" with his right arm when he was shot. Dr. Gonsoulin also testified that the bullet, which came primarily from a shooter facing Dominguez's right side, entered "slightly" from Dominguez's back, not from a gun pointing "straight ahead" at Dominguez's chest. While this possibility was consistent with Chris's testimony that Dominguez was reaching into his motorcycle's saddlebags when Chris fired the gun, this does "not render the State's evidence insufficient [because] the credibility determination of such evidence is solely within the jury's province and the jury is free to accept or reject the defensive evidence." *Id.*[10]

---

9 She also described the path as "almost straight across" and that the left side was "down by just a hair" or "minimally."

10 The dissent asserts that Gina's testimony was "irreconcilable with the physical evidence," specifically Dr. Gonsoulin's testimony about the bullet's trajectory. We disagree. As explained above, Dr. Gonsoulin testified that she could not exclude the possibility that Dominguez had his hands up, but could only say that the gun could not have been pointed at his chest from the front. And Gina did not specifically testify that the gun was in front of Dominguez.

Indeed, Dr. Gonsoulin's testimony was in some ways supportive of Gina's account. The area of the bullet's entry under the right armpit generally "is covered whenever that person's arm is down." She testified:

> Q. So let's go back and talk about the gunshot wound. What does the position of the gunshot wound on Emmanuel Dominguez being about right here; is that correct?
>
> A. A little higher.
>
> Q. What does that tell you as far as the position of his right arm whenever the bullet entered his body?
>
> A. At the time of the discharge, his armpit was exposed, which means that his shoulders were at least raised to expose that area of the body.

She also testified that while the armpit would be exposed if someone was reaching far enough, it would not be exposed if someone was reaching across and down because reaching down "cover[s] up that armpit." The inference from this testimony, combined with testimony and photographic evidence that Dominguez's motorcycle was laid on the ground, was that Dominguez likely was not reaching down when he was shot. Chris did not present any expert witness to support his contention that Dominguez was reaching down when he was shot.

Chris urges us to discredit Gina's testimony because Gina was mistaken when she apparently testified that Dominguez was facing Chris when he was shot. But a jury may disregard mistakes by a witness on one portion of the witness's testimony and still credit other portions of the witness's testimony—here that

Dominguez had his hands up. *See Sharp*, 707 S.W.2d at 611; *Henderson*, 29 S.W.3d at 616. Moreover, Dr. Gonsoulin testified that Dominguez could have turned shortly before the shooting.

To the extent that the evidence conflicted regarding Dominguez's orientation with respect to Chris when the shot was fired, the resolution of such conflicts is the province of the jury, and the jury could have resolved such conflicts in a number of ways, including by crediting other parts of Gina's testimony or Chris's own testimony that he was standing to Dominguez's side. *See Bartlett*, 270 S.W.3d at 150 (jury is exclusive judge of facts proved and weight to be given to testimony); *Sharp*, 707 S.W.2d at 614 ("[A] witness may be believed even though some of his testimony may be contradicted and part of his testimony recorded, accepted, and the rest rejected."); *Henderson*, 29 S.W.3d at 623. With the testimony presented, the jury could have believed that Dominguez backed away at an angle to Chris or that, while Dominguez was backing directly away, he turned before the bullet struck him.[11]

---

[11] The dissent states that Gina's testimony that Dominguez put his hands up and backed away without making any threats is "[t]he only evidence that is inconsistent with [Chris's] defensive theories." We disagree. The evidence shows that Chris had little to no knowledge of unfolding events when he emerged from the house with a gun, that the physical confrontation between Dominguez and Braughton Sr. ended before Chris fired a shot, that Bannon did not see a fight at all, and that Mrs. Braughton made numerous statements from which a reasonable jury could infer that Chris's use of deadly force was unnecessary. These facts, among others, are also inconsistent with Chris's theory that defensive, deadly force was immediately necessary.

As we observed in another case involving a claim of self-defense,

> The jury's decision to reject [the] defensive claims . . . ultimately hinges on the credibility of the witnesses. As factfinder, the jury is entitled to judge the credibility of witnesses, and can choose to believe all, some, or none of the testimony presented by the parties. The statements of the defendant and his witnesses do not conclusively prove a claim of self-defense or defense of a third party.

Smith v. State, 355 S.W.3d 138, 146 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (citations and internal quotation marks omitted).

In conclusion, taking the evidence in the light most favorable to the verdict, the jury rationally could have chosen not to believe Chris and his family's testimony that would have supported a finding that Chris reasonably believed deadly force was immediately necessary to protect himself or third persons from Dominguez's impending attempted use of deadly force. We cannot substitute our view of these witnesses' credibility based on a cold record for that of the factfinder. *Smith*, 355 S.W.3d at 144; *see Brooks*, 323 S.W.3d at 899 (jury is sole judge of witnesses' credibility and weight to be given their testimony). Nor can we conclude that the imperfections in Gina's testimony by themselves are sufficient to conclusively establish a reasonable doubt. *See Williams*, 235 S.W.3d at 750. Even without Gina's testimony, the jury was not required to accept Chris's defensive claims. Indeed, additional testimony—from Gonsoulin, Bannon, and even the Braughtons—cast doubt on Chris's claim that he had a reasonable belief in the need to use deadly force.

As an appellate court, our review is limited. First, we review the evidence in the light most favorable to the prosecution. *Saxton*, 804 S.W.2d at 914. Second, we may not "act as a 'thirteenth juror' by overturning a jury's duly-delivered verdict simply because we 'disagree with [that] verdict.'" *Thornton*, 425 S.W.3d at 303. We may set aside the jury's guilty verdict only if no reasonable juror could reach the verdict the jury reached. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Saxton*, 804 S.W.2d at 914. We must affirm, however, if, "after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of murder beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt." *Saxton*, 804 S.W.2d at 914. Applying these standards, after reviewing all the evidence, we conclude that legally sufficient evidence supports the verdict, and therefore overrule Chris's second issue.

Charge Error

In his third issue, Chris argues that the trial court committed reversible error by refusing his request for an instruction on the lesser-included offense of felony deadly conduct. In response, the State argues that Chris was not entitled to the instruction because there was no evidence to support it. Alternatively, the State argues that any error was harmless because the charge included an instruction on the *intervening* lesser-included offense of manslaughter, which the jury rejected,

indicating that it would have also rejected the *even lesser*-included offense of deadly conduct.

A. When a lesser-included-offense instruction is required

The Code of Criminal Procedure provides that an offense is a lesser-included offense of a charged offense if

> (1) it is established by proof of the same or less than all the facts required to establish the commission of the charged offense;
>
> (2) it differs from the charged offense only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
>
> (3) it differs from the charged offense only in the respect that a less culpable mental state suffices to establish its commission; or
>
> (4) it consists of an attempt to commit the charged offense or an otherwise included offense.

TEX. CODE CRIM. PROC. art. 37.09.

A defendant is entitled to an instruction on a lesser-included offense if the lesser-included offense satisfies a two-prong test. *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016); *Cavazos v. State*, 382 S.W.3d 377, 382–83 (Tex. Crim. App. 2012).

Under the first prong, the lesser-included offense must actually be a lesser-included offense of the charged offense. *Palmer v. State*, 471 S.W.3d 569, 570 (Tex. App.—Houston [1st Dist.] 2015, no pet.). That is, the lesser-included offense must be included "within the proof necessary to establish the offense charged."

Bullock, 509 S.W.3d at 924; *see Cavazos*, 382 S.W.3d at 382; *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007). Whether a lesser-included offense satisfies the first prong is a question of law, which we review de novo without considering the evidence. *Bullock*, 509 S.W.3d at 924; *Hall*, 225 S.W.3d at 535; *Palmer*, 471 S.W.3d at 570.

Under the second prong, the lesser-included offense must be "a valid, rational alternative to the charged offense." *Bullock*, 509 S.W.3d at 925. To be a valid, rational alternative, the lesser-included offense must be supported by some evidence in the record that would permit the jury rationally to find the defendant guilty of only the lesser charge. *Cavazos*, 382 S.W.3d at 383. That is, there must be "some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense." *Bullock*, 509 S.W.3d at 925.

"Anything more than a scintilla of evidence is adequate to entitle a defendant to a lesser charge." *Id.* Although "the evidence may be weak or contradicted, the evidence must still be directly germane to the lesser-included offense and must rise to a level that a rational jury could find that if [the defendant] is guilty, he is guilty only of the lesser-included offense." *Cavazos*, 382 S.W.3d at 385. Satisfying this standard "requires more than mere speculation—it requires

affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Id.*

In reviewing the evidence to determine whether the lesser-included offense satisfies the second prong, "we may not consider '[t]he credibility of the evidence and whether it conflicts with other evidence or is controverted.'" *Goad v. State*, 354 S.W.3d 443, 446–47 (Tex. Crim. App. 2011) (quoting *Banda v. State*, 890 S.W.2d 42, 60 (Tex. Crim. App. 1984)). The second prong "may be satisfied if some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations." *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). If the record contains more than a scintilla of evidence from which a jury could rationally find the defendant guilty of only the lesser-included offense, the defendant is entitled to the instruction—even if finding the defendant guilty of the lesser-included offense "would require the jury to believe only portions of certain witnesses' testimony." *Bullock*, 509 S.W.3d at 929.

Whether a lesser-included offense satisfies the second prong is a question of fact, which we review for an abuse of discretion, considering all the trial evidence. *Bullock*, 509 S.W.3d at 929; *Cavazos*, 382 S.W.3d at 383; *Palmer*, 471 S.W.3d at 570.

B. When the omission of a lesser-included-offense instruction is harmful

"The erroneous refusal to give a requested instruction on a lesser-included offense is charge error subject to an *Almanza* harm analysis." *Nangurai v. State*, 507 S.W.3d 229, 234 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd); *see Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on rehearing). When, as here, error has been properly preserved, we will reverse if the error resulted in some harm to the defendant. *Nangurai*, 507 S.W.3d at 234.

Ordinarily, if the trial court's refusal to submit an instruction on the lesser-included offense "left the jury with the sole option either to convict the defendant of the charged offense or to acquit him, some harm exists." *Id.* The harm from omitting an instruction on a lesser-included offense "stems from the potential to place the jury in the dilemma of convicting for a greater offense in which the jury has reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer." *Masterson v. State*, 155 S.W.3d 167, 171 (Tex. Crim. App. 2005). Thus, the submission of an instruction on an intervening lesser-included offense—an offense that is between the requested lesser-included offense and the charged offense—may serve as "an available compromise, giving the jury the ability to hold the wrongdoer accountable without having to find him guilty of the charged (greater) offense." *Id.* When a trial court instructs on one lesser-included offense but refuses to instruct on a separate lesser-included offense, the

inclusion of one lesser-included offense "may, in appropriate circumstances, render a failure to submit the requested lesser offense harmless." *Id.*

In determining whether the submission of an instruction on an intervening lesser-included offense rendered the trial court's error harmless, we consider whether the jury rejected the intervening lesser-included offense. *Id.* at 171–72. If the jury rejected the intervening lesser-included offense, and the rejection indicates that the jury legitimately believed that the defendant was guilty of the greater charged offense, the trial court's refusal to submit the requested instruction on another lesser-included offense was harmless. *Id.*; *Saunders v. State*, 913 S.W.2d 564, 573–74 (Tex. Crim. App. 1995) (holding "that because the jury did not opt to convict appellant of involuntary manslaughter, failure to authorize conviction for negligent homicide was harmless"); *Flowers v. State*, No. 01-12-00527-CR, 2013 WL 4081412, at *8 (Tex. App.—Houston [1st Dist.] Aug. 13, 2013, no pet.) (mem. op., not designated for publication) ("[W]hen the jury is charged on a lesser-included offense, albeit not one that the defendant requested, the jury's decision to convict of the charged offense, instead of convicting of the 'intervening lesser-included offense,' may render a failure to submit the requested lesser-included offense harmless.").

We also consider the plausibility of the intervening lesser-included offense. *Masterson*, 155 S.W.3d at 171. If the jury rejected the intervening lesser-included

offense, and the intervening submitted lesser-included offense was just as plausible as the requested but refused lesser-included offense, then the trial court's refusal to submit the requested instruction was harmless. *Id.* (explaining that inclusion of instruction on intervening lesser offense does not automatically foreclose harm because in some circumstances intervening lesser offense may be least plausible theory under evidence); *Saunders*, 913 S.W.2d at 573 (explaining that jury's conviction for murder instead of lesser-included offense of involuntary manslaughter does not establish, *a fortiori*, that jury would not have convicted for negligent homicide because jury may have found conscious disregard of risk to be *least* plausible theory under evidence).

Here, the offense charged was murder, the intervening lesser-included offense included in the charge was manslaughter, and the requested even-lesser-included offense omitted from the charge was felony deadly conduct. In descending level of seriousness based on the possible punishment ranges, the offenses were as follows:

Murder (1st Degree)	→	Manslaughter (2d Degree)	→	Deadly Conduct (3d Degree)[12]

[12] The punishment range for murder, a first-degree felony, is confinement for life or for any term of not more than 99 years or less than 5 years and a fine not to exceed $10,000. TEX. PENAL CODE §§ 12.32 (establishing punishment range for first degree felony), 19.02(c) (establishing murder as first degree felony). The punishment range for manslaughter, a second-degree felony, is confinement for not more than 20 years or less than 2 years and a fine not to exceed $10,000. *Id.* §§ 12.33 (establishing punishment range for second degree felony), 19.04(b)

A person commits murder if he either (1) "intentionally or knowingly causes the death of an individual" or (2) "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual . . . ." TEX. PENAL CODE § 19.02(b)(1)–(2).

A person commits manslaughter "if he recklessly causes the death of an individual." *Id.* § 19.04(a). "A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur."[13] *Id.* § 6.03(c).

A person commits third-degree felony deadly conduct "if he knowingly discharges a firearm at or in the direction of . . . one or more individuals . . . ." *Id.* § 22.05(b)(1); *see id.* § 22.05(e).

C. Whether deadly conduct is a lesser-included offense of murder

We begin our analysis by determining whether deadly conduct is a lesser-included offense of murder. Chris was charged with committing murder by

---

(establishing manslaughter as second degree felony). And the punishment range for felony deadly conduct, a third-degree felony, is confinement for not more than 10 years or less than 2 years and a fine not to exceed $10,000. *Id.* §§ 12.34 (establishing punishment range for third degree felony), 22.05(e) (establishing felony deadly conduct as third degree felony).

13 "The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *Id.* § 6.03(c).

intentionally and knowingly shooting Dominguez with a firearm, killing him. Murder requires both a more culpable mental state (intentionally or knowingly killing another) and a more serious injury to Dominguez (death) than felony deadly conduct. Thus, deadly conduct by recklessly or knowingly discharging a firearm in the direction of an individual is a lesser-included offense of intentional murder by means of discharging a firearm. *See Ortiz v. State*, 144 S.W.3d 225, 233–34 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). We conclude that deadly conduct is a lesser-included offense of murder as charged in this case.

D. Whether the evidence supports a finding of only deadly conduct

We next consider whether the record contains evidence that "both raises the lesser-included offense" of deadly conduct and "rebuts or negates an element of the greater offense," murder. *See Cavazos*, 382 S.W.3d at 385.

When, as here, a person intentionally points a firearm at or in the direction of one or more people, fires it, and kills a person, "deadly conduct is distinguished from murder . . . only by relieving the State of proving (1) an intentional act and (2) the death of an individual." *Ortiz*, 144 S.W.3d at 234. Thus, to be entitled to an instruction on the lesser-included offense of felony deadly conduct, Chris was required to show that the record contained some evidence that would permit the jury rationally to find that he knowingly discharged a firearm at or in the direction of Dominguez but did not intend to kill Dominguez or cause him to suffer serious

bodily injury. TEX. PENAL CODE §§ 19.02(b)(1)–(2), 22.05(b)(1). While Chris never explicitly testified that he did not intend to shoot Dominguez, he argues that if the jury believed certain portions of his testimony and disbelieved others, it could have rationally found that he knowingly discharged his firearm in the general direction of Dominguez but did not intend to kill or seriously injure him.

The testimony that Chris contends the jury would have to believe to find him guilty of only deadly conduct occurred during his direct examination, when Chris answered the questions of his defense counsel while the two reenacted the shooting:

> Q. As [Dominguez] reaches, go ahead and reach as he did.
>
> A. (Witness complies.)
>
> Q. And then did he come up at all?
>
> A. He began to come up.
>
> Q. Go ahead and show that if you would to the ladies and gentlemen of the jury.
>
> A. He reached over (demonstrating). I think I shot him as he was coming up.
>
> Q. I'm you right here. Let's change positions now. I'll be Dominguez. As he's coming up, what are you shooting at?
>
> A. Towards his arm.
>
> Q. When you say "arm," is this it?
>
> A. Yes.

Q. This thing here?

A. Yes, sir.

Q. Okay. Is the saddlebag here?

A. Yes, sir.

Other testimony Chris contends the jury would have to believe to find him guilty of only deadly conduct occurred during his cross-examination, when Chris explained why he shot from the hip:

Q. And it's your testimony today you had the gun at your hip?

A. I had it up initially and I just kind of went down.

Q. Is that how you fire at a gun range?

A. No, sir. Like I said, I mean, I wasn't—I just had it pointed towards his arm. I wasn't aiming at a specific area on him.

* * *

Q. When you shot him, you were intending to hit him, correct?

A. I was just pointing at his arm. I just wanted to stop him, like I said, sir.

Chris contends that this testimony, combined with several other pieces of evidence, would have permitted a jury to rationally find him guilty of only deadly conduct.[14]

---

[14] According to Chris, this includes evidence that: (1) Chris did not meet Dominguez until the night of the shooting; (2) Chris was inexperienced with firearms; (3) Chris came outside with the gun pointed "in the air"; (4) Chris repeatedly said or yelled, "Stop I have a gun"; (5) Chris fired only once even

The potentially inconsistent testimony that Chris contends the jury would have to disbelieve occurred during his cross-examination when Chris answered the prosecutor's questions about Chris's knowledge and intent:

> Q. Well, you had the gun pointed at him and you pulled the trigger, right?
>
> A. Yes, sir.
>
> Q. Did you think that a bullet was going to hit Manny Dominguez?
>
> A. Yes, sir.
>
> Q. You're aware that a bullet hitting somebody can cause serious bodily injury, correct?
>
> A. Sometimes, yes, sir.
>
> Q. So you were aware that—you were aware that you were intending to cause serious bodily injury to Manny Dominguez?
>
> A. Yes, sir.

According to Chris, the jury could have rationally determined that he was not guilty of murder and was guilty only of felony deadly conduct if it (1) believed his testimony that he shot in the general direction of Dominguez's arm but was not aiming at any specific part of his body, (2) disbelieved his testimony that he intended to hit Dominguez and cause him serious bodily injury, and (3) inferred

---

though his gun held fourteen rounds; (6) Chris remained at the scene and identified himself as the person who shot Dominguez; and (7) Dominguez was not standing immediately in front of Chris when he fired the gun.

from the evidence that Chris was inexperienced with firearms and intended to shoot in the general direction of Dominguez but did not intend to actually hit him. *See Bullock*, 509 S.W.3d at 926 (noting that jury could have concluded defendant was not guilty of theft and was guilty only of attempted theft if it believed parts of defendant's testimony and disbelieved other parts).

Because Chris did not testify that he shot "at" Dominguez, but only shot "towards his arm," and because the evidence showed that Chris was inexperienced with firearms and shot from a position that compromised his accuracy, Chris argues that his testimony can and should be interpreted as meaning that he only intended to stop or scare off Dominguez, not seriously injure him. For the reasons stated below, we conclude that we need not determine whether Chris is correct.

E. Whether the omission of a deadly-conduct instruction was harmful

Even if we accept Chris's distinction between shooting "towards" and "at" someone[15] and hold that Chris was entitled to an instruction on the lesser-included offense of felony deadly conduct, Chris is not entitled to reversal because he has not shown that the error was harmful.

First, the trial court included an instruction on an intervening lesser-included offense, and the jury rejected it. The Texas Court of Criminal Appeals has

---

15 *Compare* WEBSTER'S NEW WORLD COLLEGE DICTIONARY (5th ed. 2014) 1532 (defining "toward" as "in the direction of") *with id.* at 89 (defining "at" as "to or toward as the goal or object").

observed that an appellate court "can conclude that the intervening offense instruction renders the error harmless if the jury's rejection of that offense indicates that the jury legitimately believed that the defendant was guilty of the greater, charged offense." *Masterson*, 155 S.W.3d at 171–72 (holding that denial of instruction on criminally negligent homicide was harmless when jury rejected intervening offense of manslaughter and convicted defendant of capital murder).

Here, the charge included the following instruction on the intervening lesser-included offense of manslaughter:

> Unless you so find from the evidence beyond a reasonable doubt [that Chris is guilty of murder], or if you have a reasonable doubt thereof, or if you are unable to agree, you will next consider whether the defendant is guilty of the lesser offense of manslaughter.
>
> Our law provides that a person commits the offense of manslaughter if he recklessly causes the death of an individual.
>
> A person acts recklessly, or is reckless, with respect to the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise as viewed from the defendant's standpoint.
>
> Therefore, if you find from the evidence beyond a reasonable doubt that on or about the 24th day of May, 2013, in Harris County, Texas, the defendant, Christopher Ernest Braughton, did then and there unlawfully, recklessly, as that term is hereinbefore defined, cause the death of Emmanuel Dominguez by shooting Emmanuel Dominguez with a deadly weapon, namely, a firearm, then you will find the defendant guilty of manslaughter.

Thus, the jury was not placed in the position of either convicting for a greater offense in which it had reasonable doubt or releasing entirely from criminal liability a person it was convinced was a wrongdoer. *See Masterson*, 155 S.W.3d at 171. The intervening lesser-included offense of manslaughter served as an available compromise, affording the jury the opportunity to hold Chris accountable without having to find him guilty of murder. *Id.* If the jury believed Chris lacked the requisite intent for murder, it would have convicted him only of manslaughter; its rejection of manslaughter (and Chris's defenses) indicates that it legitimately believed he committed murder. *See id.* at 171–72 (holding that any error caused by not instructing jury on criminally negligent homicide was harmless when defendant was convicted of charged offense of capital murder and jury rejected lesser-included intermediate offense of manslaughter).[16]

---

[16] *See also Orona v. State*, 341 S.W.3d 452, 462 (Tex. App.—Fort Worth 2011, pet. ref'd) (holding that conviction for murder despite availability of manslaughter showed that jury believed defendant possessed specific intent required for murder); *Flores v. State*, 215 S.W.3d 520, 530–31 (Tex. App.—Beaumont 2007) (holding that any error in not instructing jury on felony murder was harmless when trial court instructed jury on manslaughter and injury to child and jury found defendant guilty of greater charged offense), *aff'd*, 245 S.W.3d 432 (Tex. Crim. App. 2008); *Reed v. State*, No. 01-13-00768-CR, 2014 WL 3697797, at *5 n.3 (Tex. App.—Houston [1st Dist.] July 24, 2014, no pet.) (mem. op., not designated for publication) ("Even assuming that [the defendant] was entitled to the manslaughter instruction, the omission of that instruction was harmless because the jury rejected the lesser-included intermediate offense of felony murder and found sufficient evidence to convict him of the charged offense of capital murder.").

Second, the intervening lesser-included offense that the jury rejected, manslaughter, was just as plausible as the omitted lesser-included offense, deadly conduct. Manslaughter's intent requirement is lower than that of felony deadly conduct. *Compare* TEX. PENAL CODE § 19.04(a) (manslaughter requires proof of recklessness), *with id.* §§ 22.05(b)(1), 22.05(e) (felony deadly conduct requires knowing conduct). And it is undisputed that at the time of his deliberate firing of the gun he had loaded, Chris was aware that he was (1) an inexperienced shooter, (2) shooting at close range, (3) from a posture that compromised his aim, while (4) aiming in the general direction of Dominguez's arm. Accepting Chris's argument that the jury could have concluded that he intended only to scare Dominguez and lacked an intent to actually hit him, it would have been equally plausible for the jury to believe he was reckless about the substantial and unjustified risk that he would actually hit Dominguez and kill him, so as to find him guilty of manslaughter.[17] *See Britain*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013) ("Manslaughter is a result-oriented offense: the mental state must relate to the results of the defendant's actions."); *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003) (noting that examples of manslaughter include "an accidental discharge of a firearm, a lack of intent to kill, or a physical struggle between the

[17] The jury's rejection of Chris's claims that he acted in self-defense and in defense of others shows that the risk was unjustified.

defendant and the victim"); *Shanklin v. State*, 190 S.W.3d 154, 159–60 (Tex. App.—Houston [1st Dist.] 2005, pet. dism'd) (holding that defendant who "shot in the group's direction" to "scatter" them was entitled to manslaughter instruction); *Hernandez v. State*, 742 S.W.2d 841, 843 (Tex. App.—Corpus Christi 1987, no pet.) (holding defendant who fired "to scare" entitled to involuntary manslaughter charge).

Because manslaughter was just as plausible a theory as deadly conduct, and because the jury rejected manslaughter under the evidence presented, we hold that Chris was not harmed by the trial court's refusal to include his requested instruction on the lesser-included offense of deadly conduct. Accordingly, we overrule Chris's third issue.

Conclusion

We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Justices Keyes, Brown, and Huddle.

Justice Keyes, dissenting.

Publish. TEX. R. APP. P. 47.2(b).

Exhibit B

Opinion issued December 29, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00393-CR

CHRISTOPHER ERNEST BRAUGHTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1389139

DISSENTING OPINION

The majority affirms the trial court's judgment convicting appellant, Christopher Ernest Braughton, of the offense of murder, implicitly affirming the jury's rejection of appellant's defenses of self-defense and defense of a third person. I believe both the majority's application of the standard of review of the jury's rejection of these defenses and its judgment are erroneous. I also believe the

issue is one of fundamental importance to the criminal law of this state. Accordingly, I respectfully dissent.

To my knowledge, the Texas Court of Criminal Appeals has not addressed the standard of review of the sufficiency of the evidence for rejecting the defenses of self-defense and defense of a third person since it adopted the single standard of review for legal and factual sufficiency set out in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979), and in 2010 in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010) (plurality op.). I believe the standard for making this determination remains that set out prior to *Brooks* in *Zuliani v. State*, 97 S.W.3d 589 (Tex. Crim. App. 2003) and *Saxton v. State*, 804 S.W.2d 910 (Tex. Crim. App. 1991). I further believe no reasonable jury could rationally have rejected appellant's defenses on that standard. The majority, however, opines that it is not allowed to sit as a "thirteenth juror." Thus, it refuses to evaluate the reasonableness of the jury's rejection of these defenses, and it affirms appellant's murder conviction. I would acquit.

Background

The majority opinion provides an extensive statement of the facts of this case. However, I repeat the facts pertinent to appellant's claims of self-defense and defense of a third person in order to put those facts in their proper perspective in light of all of the evidence adduced at trial.

On May 24, 2013, the complainant, Emmanuel Dominguez, who was a United States Marine preparing to retire from the Marine Corps, fought with his fiancée while they were out drinking. Dominguez—who was intoxicated with a blood alcohol concentration more than twice the legal limit—left the bar alone on his motorcycle.[1]

That same evening, appellant's father ("Braughton Sr."), mother ("Mrs. Braughton"), and younger brother Devin were dining out while appellant, age twenty-one, stayed home at his parents' house. The Braughtons, like Dominguez, lived on Greenland Oak Court, but appellant had never met Dominguez. At approximately 10:00 p.m., Braughton Sr. began driving home, with Mrs. Braughton and Devin riding in the family vehicle. As they neared their home, Braughton Sr. was driving approximately fifteen to eighteen miles per hour in an area with a twenty-mile-per-hour speed limit. Braughton Sr. saw a "big bright light" immediately behind the vehicle. He then heard "a really loud revving sound," and a vehicle alarm alerted that there was an object very close to the vehicle's rear bumper. Braughton Sr. determined from the light, the engine sound, and the vehicle's alarm that a motorcycle was very close to his car.

---

[1] At the time of his death, Dominguez had a blood alcohol concentration of 0.17 grams per deciliter, which is more than twice the statutory limit of 0.08 grams per deciliter for driving while intoxicated. *See* TEX. PENAL CODE ANN. § 49.01(1)(A), (2)(B) (West 2011). A test of his urine showed an even higher blood alcohol concentration of 0.22 grams per deciliter.

According to Braughton Sr., Dominguez, who was driving the motorcycle, drove around the side of the Braughton's car, "tried to swerve into the side of the car," then drove around in front of the Braughtons and "slam[med] on his brakes." The vehicle's proximity sensors again alarmed. Braughton Sr. had to "slam" on his own brakes to avoid hitting the motorcycle. He then passed the motorcycle and continued home. Dominguez followed the Braughton family onto Greenland Oak Court.

As this was occurring, Mrs. Braughton called appellant and told him they were being chased. According to Braughton Sr., as he approached his driveway, Dominguez "start[ed] coming around the car" again and blocked the Braughtons' driveway. Braughton Sr. drove around the cul-de-sac at the end of Greenland Oak Court, stopping on the opposite side of the street from the Braughton home. Dominguez stopped the motorcycle near the driveway to the home of Robert Bannon, who lived in the house between the Braughton residence and the house rented by Dominguez and his fiancée. Bannon, who was sitting in his driveway at the time, noticed that the motorcycle was only one or two feet away from the Braughtons' car and "thought [Dominguez] didn't know how to drive a motorcycle because he looked like he was kind of wobbling."

Dominguez dismounted the motorcycle and "rather quickly" approached the car, and Braughton Sr. got out of his vehicle. The men began yelling at each other,

with Braughton Sr. demanding to know, "Why the [expletive] you following me so close for?," and Dominguez yelling back and "cussing" at Braughton Sr. Dominguez began punching Braughton Sr. in his face and "beating him up," while Braughton Sr. attempted to defend himself. Dominguez knocked Braughton Sr. to the ground. This altercation occurred near the motorcycle.

Meanwhile, appellant had gone to his parents' bedroom, where he kept a 9-millimeter handgun that he had purchased approximately three months earlier. He retrieved the gun and loaded it. During the altercation between Dominguez and Braughton Sr., appellant came out of his parents' house with the loaded gun, saw Dominguez beating Braughton Sr., and said several times, "Stop, I have a gun."

Witnesses at trial gave conflicting accounts of what happened next. Appellant, Braughton Sr., Mrs. Braughton, and Glen Irving (a neighbor) all testified that Dominguez then threatened that he had either a gun or "something for" appellant. Specifically, appellant testified that Dominguez said, "Oh, you have a gun, m_____f____. I have a gun for you," then reached into a saddlebag on the motorcycle. Other witnesses corroborated that Dominguez threatened appellant. For example, Irving, the neighbor, testified that Dominguez "turned and started back towards the motorcycle, and [Irving] heard a voice say, 'Yeah, I got a gun, too, m_____f____,'" or possibly, "I've got something for you, m_____f____." Another neighbor, Bannon, saw Braughton Sr. being followed

closely by Dominguez, an argument between the two, appellant coming out with a gun, and Dominguez lying on the ground after being shot.

Appellant testified that Dominguez, who was positioned with the saddlebag to his left, reached across his body with his right arm, turning as he did so, and began to straighten up. Similarly, Braughton Sr. testified that Dominguez reached toward a saddlebag on the motorcycle, "just grab[bed] the box and open[ed] it," then reached into it.

Gina,[2] a high-school junior who also lived on Greenland Oak Court, testified and gave a very different account. Gina watched events unfold from her second-story bedroom in a house across the street. Gina testified that she did not have a relationship with or know the names of any of the individuals involved in the fight and subsequent shooting, although she recognized them as her neighbors and was able to associate them with their respective homes. She identified the participants by the color of the clothing that they wore on the night in question and their respective genders. She testified that she could not see a gun, faces, or many details of the scene "clearly" because a light-blocking screen on her window made her view of the street "blurry."

Nonetheless, Gina testified that she saw Braughton Sr. and Dominguez arguing when appellant came from the direction of the Braughtons' house "with

---

[2] For purposes of consistency, I use the same pseudonym assigned to this witness by the majority.

his right arm stretched out with a gun in his hand." She testified that appellant "just walk[ed] straight to [Dominguez] and then he stop[ped]." Gina stated that Dominguez was backing up with his arms raised when appellant shot him. Gina testified that she heard Mrs. Braughton tell appellant to put his gun down and go back in the house. Gina further testified that, instead of complying, appellant replied, "No, I got a gun now," and walked toward Dominguez, who "stopped and put his hands up" and "slowly back[ed] up." Gina testified that she did not see Dominguez approach the motorcycle, open a saddlebag, or reach for anything.

However, on cross-examination, appellant's attorney questioned Gina regarding portions of her trial testimony that were contradicted by her statement to police on the day of the shooting. In that statement, Gina told police that she saw appellant and Dominguez—rather than Braughton Sr. and Dominguez—arguing and engaging in a shoving match prior to the shooting. Gina further told police, in her statement on the night of the shooting, that after appellant and Dominguez engaged in their shoving match, appellant pulled out a gun and shot Dominguez. Gina testified on cross-examination that her memory of events "would be better whenever [she] made the statement" to police on the night of the shooting than at trial, and she reiterated that everything she had said in her statement on the night of the shooting was true and correct despite the contradictions between that statement and her testimony at trial.

The remaining sequence of events is undisputed. Appellant testified that he "pointed [the gun] towards [Dominguez's] arm," without "aiming at a specific area on him," and pulled the trigger, shooting Dominguez one time. The bullet hit Dominguez under his right armpit, toward the back of his body. The bullet traveled right to left, "very slightly upward," and "slightly back to front," puncturing both of Dominguez's lungs and damaging his "aorta, the major artery coming out from the heart," resulting in the loss of at least three liters of blood. The medical examiner who later examined Dominguez, Dr. Morna Gonsoulin, testified that such injuries can kill a person "within seconds."

Additional evidence, in the form of testimony by investigating officers, physical evidence collected at the scene, and evidence admitted through the medical examiner, is pertinent here. Specifically, one of the officers, Corporal J. Talbert of the Constable's Office, Precinct 4, authenticated several photographs as fair and accurate representations of the scene as it appeared when he arrived. Several of these photographs show one of the two saddlebags on Dominguez's motorcycle open. Another officer, Deputy Medina, testified that she found no weapons on Dominguez's person or in his saddlebags, but that one of the saddlebags was open when she arrived on the scene.

Dr. Gonsoulin, the assistant medical examiner who conducted the autopsy of Dominguez, testified that Dominguez died from a single gunshot wound and that

the path of the bullet went "basically from the right armpit to the left armpit." For the bullet to follow its trajectory required Dominguez to expose his right armpit and have his left side slightly lower than the right when he was shot. According to Dr. Gonsoulin, this meant that Dominguez could have been shot while bending, reaching, or extending his right arm across his body toward his left side. She testified that the gun could not have been "straight ahead pointing at the chest of the deceased, Emmanuel Dominguez." According to Dr. Gonsoulin, Dominguez could have been shot while turning, but it was "impossible" for Dominguez to be "shot facing the shooter with his arms up." She later clarified that a claim that Dominguez "was shot [while] facing the shooter with his hands in the air" would be physically impossible and "inconsistent with the gunshot wound." Dr. Gonsoulin's testimony was supported by photographic evidence showing that the gunshot wound was under Dominguez's right arm, an X-ray image showing the bullet inside the left side of Dominguez's chest, and the autopsy report describing the bullet's trajectory.

Finally, the DNA analyst, Z. Phillips, testified that she found DNA consistent with Braughton Sr.'s DNA on a knuckle on Dominguez's right hand but did not find any DNA consistent with appellant's DNA on Dominguez.

The defense presented testimony from Glen Irving, Braughton Sr., and Mrs. Braughton that Dominguez was chasing the Braughtons erratically down the street

and riding "almost on [their] bumper." The Braughtons all testified that Mrs. Braughton frantically called appellant while Dominguez was chasing them. Irving and the Braughtons testified that Dominguez was "punching and beating up" Braughton Sr. The Braughtons each testified that at that time they were afraid for their lives. Irving and the Braughtons testified that appellant warned Dominguez as the latter was attacking Braughton Sr., "Stop, I have a gun." They all testified that Dominguez then knocked down Braughton Sr. and went toward his motorcycle, cursing and threatening that he had a gun or "something for" appellant. Each of these witnesses also testified, however, that they never saw a gun or other weapon in Dominguez's possession. They also testified that appellant fired only one shot, and Dominguez fell.

The defense also presented Gary Gross, who installed many of the solar screens in the neighborhood, including the screen in Gina's bedroom window. He testified to the increased difficulty of seeing through these windows at night, stating that the screen was a "90 percent Suntex solar screen," meaning that it would "block 90 percent of visible light," was designed to provide privacy, and would be difficult to see through at night. According to Gross, at 10:00 p.m., it would be possible to see "some visible light" through the screen and to "see something," but not to "make out what it is." He confirmed that it would

"probably not" be possible for anyone looking through the screen at that time to "make out what they are seeing."

Appellant testified that he "was just pointing [the gun] at [Dominguez's] arm" and "just wanted to stop him." He confirmed, under cross-examination, that he pointed the gun at Dominguez, pulled the trigger, and thought "that a bullet was going to hit Manny Dominguez."

The trial court charged the jury, instructing it on the offense of murder and the lesser-included offense of manslaughter. Additionally, the trial court instructed the jury on the law of self-defense, defense of a third person, and defense of property. Appellant requested that the trial court also include an instruction on the lesser offense of felony deadly conduct, but the trial court declined that request.

The jury convicted appellant of murder and assessed his punishment at twenty years' confinement. This appeal followed.

Legal Sufficiency of the Evidence Supporting the Jury's Rejection of Defenses of Self-Defense and Defense of a Third Person

A. Standard of review of sufficiency of the evidence to support conviction beyond a reasonable doubt

The standard of review of the sufficiency of the evidence to support a murder conviction was established by the United States Supreme Court in *Jackson*, 443 U.S. 307, 99 S. Ct. 2781, and adopted by the Texas Court of Criminal Appeals in *Brooks*, 323 S.W.3d 893, and *Adames v. State*, 353 S.W.3d 854 (Tex. Crim.

App. 2011). When reviewing the sufficiency of the evidence under the *Jackson* and *Adames* standard, we must view all of the evidence in the light most favorable to the verdict to determine whether any rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 859 (holding that "the *Jackson* standard is the 'only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt'") (quoting *Brooks*, 323 S.W.3d at 912).

In *Brooks*, the Court of Criminal Appeals abolished the distinction between legal sufficiency review and factual sufficiency review for evidentiary issues that must be decided beyond a reasonable doubt. It held that, in finding guilt beyond a reasonable doubt, the reviewing court must not sit as a "thirteenth juror," "disagree with a jury's resolution of conflicting evidence," or disagree "with a jury's weighing of the evidence." *Brooks*, 323 S.W.3d at 899 (internal quotations omitted) (contrasting legal sufficiency review—done in light most favorable to verdict—with factual sufficiency review—done in neutral light—and quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S. Ct. 2211, 2218 (1982)). It opined,

> [T]he difference between a factual-sufficiency standard and a legal-sufficiency standard is that the reviewing court is required to defer to the jury's credibility and weight determinations (i.e., it must view the evidence in the light most favorable to the verdict) under a legal-

> sufficiency standard while it is not required to defer to a jury's credibility and weight determinations (i.e., it must view the evidence in a "neutral light") under a factual-sufficiency standard.

Id. at 899–900.

In *Adames*, the Court of Criminal Appeals further explained the standard of review of sufficiency of the evidence. That standard requires that a reviewing court view *all of the evidence* in the light most favorable to the verdict—*not* just the evidence supporting the verdict. *Adames*, 353 S.W.3d at 860. It opined that "[t]his standard recognizes the trier of fact's role as the sole judge of the weight and credibility of the evidence after drawing *reasonable* inferences from the evidence." *Id.* (emphasis added). The reviewing court then "determines whether the necessary inferences made by the trier of fact are reasonable, based upon the cumulative force of all of the evidence." *Id.* (emphasis added). This determination is made "by measuring the evidentiary sufficiency with 'explicit reference to the substantive elements of the criminal offense as defined by state law.'" *Id.* (quoting *Jackson*, 443 U.S. at 324 n.16, 99 S. Ct. at 2792 n.16). The jury's ultimate conclusion must be *rational* in light of all of the evidence. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 860; *Nelson v. State*, 405 S.W.3d 113, 122–23 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd).

When an appellate court reverses a conviction for legally insufficient evidence, this has the same effect as an acquittal by a jury. *Tibbs*, 457 U.S. at 41,

102 S. Ct. at 2218; *Brooks*, 323 S.W.3d at 903 & n.21 (citing *Burks v. United States*, 437 U.S. 1, 17–18, 98 S. Ct. 2141, 2150–51 (1978), and *Greene v. Massey*, 437 U.S. 19, 24, 98 S. Ct. 2151, 2154 (1978)); *McGuire v. State*, 493 S.W.3d 177, 204 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (if evidence is insufficient under *Jackson* standard, we must reverse and enter judgment of acquittal). Accordingly, "[i]f, based on all the evidence, a reasonably minded jury must necessarily entertain a reasonable doubt of the defendant's guilt, due process requires that we reverse and order a judgment of acquittal." *Fisher v. State*, 851 S.W.2d 298, 302 (Tex. Crim. App. 1993) (quoting *Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992)); *see Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004).

Although we must presume that the jury resolved conflicts in the evidence in favor of its verdict, that dictate applies only when the record supports conflicting inferences. *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). A fact-finder is permitted "to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial." *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). However, "[t]he jury is not permitted to draw conclusions based on speculation because doing so is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Temple*, 390

S.W.3d at 360; *Hooper*, 214 S.W.3d at 16 ("Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented.").

The Court of Criminal Appeals has explained the proper analysis for evidentiary sufficiency and the requirement of a rational outcome using a hypothetical example. In *Brooks*, that court discussed a hypothetical "robbery-at-a-convenience-store case." 323 S.W.3d at 906–07 (quoting *Johnson v. State*, 23 S.W.3d 1, 15 (Tex. Crim. App. 2000) (McCormick, P.J., dissenting)). The court explained the hypothetical as follows:

> The store clerk at trial identifies A as the robber. A properly authenticated surveillance videotape of the event clearly shows that B committed the robbery. But, the jury convicts A. It was within the jury's prerogative to believe the convenience store clerk and disregard the video. But based on *all* the evidence the jury's finding of guilt is not a rational finding.

Id. at 907 (internal citation omitted). The court identified this example as "a proper application of the *Jackson v. Virginia* legal-sufficiency standard." *Id.*

In reviewing the sufficiency of the evidence when a jury has rejected claims of self-defense or defense of a third person, the court must "determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of murder beyond a reasonable doubt *and also would have found against appellant on the self-defense issue beyond a reasonable doubt*." *Saxton*, 804 S.W.2d at 914 (emphasis added).

B. Application of standard of review by the majority

In determining the sufficiency of the evidence supporting the jury's rejection of appellant's claims of self-defense and defense of a third person, the majority states that it is compelled to "review the evidence in the light most favorable to the prosecution" and that it may not "act as a 'thirteenth juror' by overturning a jury's duly-delivered verdict simply because [it] disagree[s] with that verdict." Slip Op. at 39 (citing *Saxton*, 804 S.W.2d at 914 and *Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014) (internal quotations omitted)). And it stops its analysis there.

The majority, however, ignores the principle that the jury's ultimate conclusion *must be rational* in light of all of the evidence. *See, e.g.*, *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789. And it ignores the mandate that the reviewing court must determine *both* that such a rational trier of fact "would have found the essential elements of murder beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt." *Saxton*, 804 S.W.2d at 914. It does not even try to determine whether it was rational for the jury to reject appellant's defenses of self-defense and defense of a third person after reviewing all the evidence—including the evidence in support of appellant's defenses. *See Adames*, 353 S.W.3d at 860. Worse, as shown below, it indulges in its own speculation as to how the jury might have reached its

conclusion by going outside the record, by irrationally crediting testimony, and by disregarding unrebutted physical evidence. It thus provides itself no rational basis for determining that a rational jury would have found against appellant on the defenses of self-defense and defense of a third person. Instead, it approves the jury's irrational evaluation of the evidence supporting appellant's defenses and, accordingly, irrationally affirms the judgment of the trial court. But the error goes even beyond that.

The majority's reasoning undermines the purpose behind a court of appeals' review of the evidence. Although we defer to a jury's determinations "when the record evidence paints conflicting pictures of innocence and guilt," an appellate court must still "act as a procedural failsafe against irrational verdicts." *Dawkins v. State*, —S.W.3d—, No. 08-13-00012-CR, 2016 WL 5957311, at *7 (Tex. App.—El Paso Oct. 14, 2016, no pet. h.) (citing *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010), and *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)). We may reverse a conviction on legal sufficiency grounds when "no rational juror could find guilt beyond a reasonable doubt based on the evidence presented at trial," including in situations "in which some evidence exists on every element, but no reasonable person could convict in light of the state of evidence was a whole, even when viewed most favorably to the prosecution." *Id.* (citing *Jackson*, 443 U.S. at 320, 99 S. Ct. at 2789 (holding that constitutional legal

sufficiency standard in criminal cases is higher than "mere modicum" of evidence standard), and *Brooks*, 323 S.W.3d at 906–07 (explaining that jury is not permitted to irrationally disregard evidence under *Jackson* standard)). The majority disregards that mandate.

C. Review of reasonableness of jury's finding of murder and rejection of self-defense and defense of a third person

A person commits the offense of murder if he intentionally or knowingly causes the death of an individual, or if he intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. *See* TEX. PENAL CODE ANN. § 19.02(b)(1)–(2) (West 2011). A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. *Id.* § 6.03(a) (West 2011). A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. *Id.* § 6.03(b). "Murder is a 'result of conduct' offense, which means that the culpable mental state relates to the result of the conduct, i.e., the causing of the death." *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003).

Intent may be proven by circumstantial evidence. *See Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) (holding that direct evidence of requisite intent is not required). "A jury may infer intent from any facts which tend to prove

its existence, including the acts, words, and conduct of the accused, and the method of committing the crime and from the nature of wounds inflicted on the victims." *Manrique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999).

Both self-defense and defense of a third person are statutorily defined and provide a defense to prosecution when the conduct in question is "justified." TEX. PENAL CODE ANN. §§ 9.02, 9.31, 9.33 (West 2011). Under Penal Code Chapter 9, "a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force." *Id.* § 9.31(a).

Likewise, "[a] person is justified in using deadly force against another . . . when and to the degree the actor reasonably believes the force is immediately necessary . . . to protect the actor against the other's use or attempted use of unlawful deadly force." *Id.* § 9.32 (West 2011) (emphasis added); *see Smith v. State*, 355 S.W.3d 138, 145 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). A person is justified in exercising deadly force in defense of a third person "[s]o long as the accused reasonably believes that the third person would be justified in using [force] to protect himself." *Smith*, 355 S.W.3d at 145; *see* TEX. PENAL CODE ANN. § 9.33. Both of these defenses—self-defense and defense of a third person—may be raised as justifications for a defendant's actions and in support of an acquittal against a charge of murder or manslaughter. *See, e.g.*, TEX. PENAL CODE ANN.

§§ 9.31–.33; *Alonzo v. State*, 353 S.W.3d 778, 781–82 (Tex. Crim. App. 2011) (self-defense is defense to both murder and manslaughter charges); *Smith*, 355 S.W.3d at 145 (defense of third person is defense to murder).

In a claim of self-defense or defense of a third person, "a defendant bears the burden of production," while "the State then bears the burden of persuasion to disprove the raised defense." *Zuliani*, 97 S.W.3d at 594 (citing *Saxton*, 804 S.W.2d at 913–914). The defendant's burden of production requires the defendant to adduce some evidence that would support a rational jury finding as to the defense. *See* TEX. PENAL CODE ANN. § 2.03(c) (West 2011) ("The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense."); *Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013); *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007).

"[E]ven a minimum quantity of evidence is sufficient to raise a defense as long as the evidence would support a rational jury finding as to the defense." *Krajcovic*, 393 S.W.3d at 286 (citing *Shaw*, 243 S.W.3d at 657–58). "[A] defense is supported (or 'raised') if there is evidence in the record making a prima facie case for the defense." *Shaw*, 243 S.W.3d at 657. "A prima facie case is that 'minimum quantum of evidence necessary to support a rational inference that [an] allegation of fact is true.'" *Id.* (quoting *Tompkins v. State*, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987)).

If the defendant meets his burden of production, the burden of persuasion shifts back to the State. *Zuliani*, 97 S.W.3d at 594. The State's "burden of persuasion is not one that requires the production of evidence, rather it requires only that the State prove its case beyond a reasonable doubt." *Id.* (citing *Saxton*, 804 S.W.2d at 913).

In light of these burdens of production and proof, "[w]hen a jury finds the defendant guilty, there is an implicit finding against the defensive theory." *Id.* A jury, however, is not permitted to reach a speculative conclusion. *Elizondo v. State*, 487 S.W.3d 185, 203 (Tex. Crim. App. 2016). Nor is it permitted to disregard undisputed facts that allow only one logical inference. *Evans v. State*, 202 S.W.3d 158, 162–63 (Tex. Crim. App. 2006); *Satchell v. State*, 321 S.W.3d 127, 132 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

The problem for a reviewing court is how to determine whether the jury *rationally* found the defendant guilty of the offense beyond a *reasonable* doubt and *rationally* rejected the defendant's evidence in support of his defenses of self-defense and defense of a third person. This problem is exacerbated by the legal principles providing that the defendant's burden of production is an *evidentiary* burden, while the State's burden of persuasion is a *non*-evidentiary burden. And in light of these burdens, the reviewing court's task is to "determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational

trier of fact would have found the essential elements of murder beyond a reasonable doubt *and also* would have found against appellant on the self-defense issue beyond a reasonable doubt." *Saxton*, 804 S.W.2d at 914 (emphasis added).

No post-*Adames* case, to my knowledge, has instructed the appellate courts on how to determine whether a reasonable jury would have found against the defendant on the issue of self-defense beyond a reasonable doubt or whether, to the contrary, the jury's rejection of the appellant's defense of self-defense or defense of a third person was irrational without conducting an analysis of the evidence supporting the defense and the evidence rebutting that evidence. In other words, no post-*Adames* Texas Court of Criminal Appeals case appears to have instructed the appellate courts how to weigh all the evidence to determine the strength of a defense on which the defendant bore the burden of production but the State bore the ultimate burden of persuasion. It did, however, instruct the appellate courts on how to make this determination *prior* to *Adames*, in *Zuliani*.

In *Zuliani*, the Court of Criminal Appeals held that when reviewing the sufficiency of the evidence supporting the rejection of a defense, "the reviewing court reviews all of the evidence in a *neutral* light and asks whether the State's evidence taken alone is too weak to support the finding and whether the proof of guilt, although adequate if taken alone, is against the great weight and preponderance of the evidence." *Zuliani*, 97 S.W.3d at 595. There is no indication

in the case law that this standard of review for the defenses of self-defense and defense of a third person was overturned by the Court of Criminal Appeals's adoption of the *Jackson* standard as the sole sufficiency of evidence standard in *Brooks* and *Adames*. Rather, the holdings of the Court of Criminal Appeals in the analogous situation of affirmative defenses is to the contrary. *See Matlock v. State*, 392 S.W.3d 662, 667 (Tex. Crim. App. 2013) (discussing standard for reviewing affirmative defenses).

Thus, I would apply the standard for reviewing the sufficiency of the evidence as set out in *Jackson*, *Brooks*, *Saxton*, and *Zuliani*. I believe this Court must review all of the evidence that a *reasonable* jury would credit and must determine whether, in light of the state of evidence as a whole, a reasonable jury could have found the essential elements of murder beyond a reasonable doubt and also could have found against appellant on his defensive issues beyond a reasonable doubt. *See, e.g.*, *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Saxton*, 804 S.W.2d at 914; *Dawkins*, 2016 WL 5957311, at *7.

To apply any other test for the sufficiency of the evidence on appellant's defenses, on which he had the burden of making a prima facie case and the State had the burden of persuasion, or the burden of overcoming that prima facie case, would be to ignore the State's burden of persuading a reasonable jury that its rejection of the defenses of self-defense and defense of a third person would be

rational in light of all the evidence, as required by *Saxton*, *Zuliani*, and *Adames*. And it would make the jury's determination of the sufficiency of the evidence to reject appellant's defenses of self-defense and defense of a third person impervious to review by this appellate court. No matter how irrational the jury's rejection of the defense, its conclusion would be *ipso facto* correct so long as evidence supported the murder conviction once the defenses were irrationally discounted. That is what I think the majority has disregarded here.

The proper standard of review does require that we defer to the jury's credibility determinations. However, that standard does not require that a reviewing court accept both the jury's determination of the sufficiency of the evidence supporting the conviction and its determination finding the evidence supporting the defense insufficient beyond a reasonable doubt without asking whether the jury's rejection of the defense was rational in light of the evidentiary burdens of both the defendant and the State with respect to that defense. This Court's job is to review the evidence that a *rational* jury could have credited in rejecting the defense as insufficiently supported by the evidence beyond a reasonable doubt and to determine whether that evidence was, in fact, sufficient to support rejection of the defense—not to rubber-stamp the findings of juries or trial courts.

Thus, for the jury's verdict to be rational, it must have been rational *both* for the jury to have found appellant guilty of murder, looking at the evidence in the light most favorable to the verdict, *and* for it to have rejected the defenses of self-defense and defense of a third person. In this case, that means that we must examine the evidence as a whole in the light most favorable to the verdict, and we must reverse the judgment of conviction if the State failed to meet its burden (1) of presenting sufficient evidence that appellant was guilty of murder beyond a reasonable doubt, including evidence that he acted with the requisite intent, or (2) of persuading the jury that appellant did not act in self-defense or defense of a third person beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Saxton*, 804 S.W.2d at 914.

As set out below, I would hold that the only credible evidence establishes that appellant acted in self-defense and defense of a third person, which necessitates a conclusion that the State failed to establish beyond a reasonable doubt that appellant was guilty of murder. It was irrational of the jury to conclude otherwise, even when viewing the evidence in the light most favorable to its verdict. And it is irrational for the majority to conclude that a rational jury would have rejected appellant's defenses beyond a reasonable doubt on the facts of this case. Consequently, the majority opinion is contrary to both *Jackson* and *Adames*.

See Jackson, 443 U.S. at 319, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 859; *Saxton*, 804 S.W.2d at 914.

D. Application of the standard of review to facts of this case

I agree with the majority that appellant carried his burden of producing evidence that he acted in self-defense or in defense of his family. But I would hold that the jury's verdict implicitly rejecting appellant's defenses and convicting him of murder is based entirely on its drawing irrational inferences. Therefore, both the finding that appellant murdered Dominguez and the implied finding rejecting appellant's defenses must be rejected as unreasonable in light of all of the evidence. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 859.

Appellant received a frantic phone call from Mrs. Braughton that Dominguez was chasing his family on his motorcycle. When appellant came out of the house, Dominguez was punching appellant's father in the face. Braughton Sr. had a bloody lip after being punched in the face by Dominguez. Appellant relies on his own testimony and testimony by his family members and Irving that when appellant came out of the house with a gun and told Dominguez, "Stop, I have a gun," Dominguez responded by acknowledging that "you have a gun" and by stating that he had "a gun" or "something for" appellant and reaching towards his motorcycle, which prompted appellant to shoot him. In addition, Bannon testified

that the overall situation was one in which appellant was "just trying to defend his dad."

This testimony was consistent with the physical evidence presented. As Dr. Gonsoulin testified, the bullet trajectory was consistent with a shot fired while Dominguez was bending or reaching downward with his right hand, as that would expose his armpit. The physical evidence was inconsistent with Dominguez being shot with his hands in the air and his body facing appellant, as Gina—the only witness who contradicted appellant's version of events—had described the scene. Gina was not explicit about the orientation of Dominguez's body relative to appellant; rather, her testimony was that Dominguez was backing away from appellant. The State, however, concedes in its appellate briefing that Dominguez was initially facing appellant and argues that the jury could have believed that Dominguez turned just as he was shot. However, this argument does not change the fact that the physical evidence demonstrates that Dominguez was turning when appellant shot him, consistent with appellant's testimony.

In light of the above testimony, appellant met his burden of production. *See* TEX. PENAL CODE ANN. § 2.03(c); *Krajcovic*, 393 S.W.3d at 286; *Shaw*, 243 S.W.3d at 657–58. That is, as the majority acknowledges, the evidence supports a rational jury finding that appellant was not guilty of murder because "(1) he justifiably acted in self-defense in response to the statement 'I got a gun for you,'

and Dominguez's subsequent motions; (2) he justifiably acted in defense of others, in particular in defense of his father, mother, and younger brother; or (3) both defenses applied." *See* Slip Op. at 31.

Because appellant met his burden of production, the State was required to carry the burden of persuasion by proving beyond a reasonable doubt that appellant's actions were not justified under either defensive theory. And, "after viewing all the evidence in the light most favorable to the prosecution," this Court was required to determine whether "any rational trier of fact would have found the essential elements of murder beyond a reasonable doubt and *also* would have found *against appellant* on the self-defense [or defense of a third person] issue *beyond a reasonable doubt*." *Saxton*, 804 S.W.2d at 914 (emphasis added); *see Zuliani*, 97 S.W.3d at 594. I disagree with the majority's conclusion that the State met its burden.

Although the State was not required to produce evidence specifically refuting appellant's theories, it still had the obligation to present evidence sufficient to permit the jury to reach its verdict of guilty, implicitly rejecting those defensive theories beyond a reasonable doubt. *See, e.g.*, *Alonzo*, 353 S.W.3d at 781 ("If there is some evidence that a defendant's actions were justified under one of the provisions of Chapter 9 [of the Penal Code], the State has the burden of persuasion to disprove the justification beyond a reasonable doubt."); *Zuliani*, 97

S.W.3d at 594–95; *Saxton*, 804 S.W.2d at 914. And the State's evidence had to establish all of the elements of murder beyond a reasonable doubt.

The only evidence that is inconsistent with the defensive theories is Gina's testimony that Dominguez put his hands up and backed away without making threats, while appellant refused to lower his weapon, saying, "No, I got a gun now." Her testimony is the only evidence as to what happened between the moment when Dominguez became aware that appellant had a gun and the moment when he was shot that does not support the defensive theory that appellant shot Dominguez because of the perceived threat that Dominguez was reaching for a gun.

But the jury could not rationally have believed Gina's testimony in light of the other evidence. Most importantly, her testimony was irreconcilable with the physical evidence. Gina was adamant in her trial testimony that appellant "just walk[ed] straight to [Dominguez] and then he stop[ped]," that Dominguez was backing away from appellant with his hands up when he was shot, and that appellant remained stationary. But, as Dr. Gonsoulin testified, the gun could not have been "straight ahead pointing at [Dominguez's] chest," nor was it possible for Dominguez to be "shot facing the shooter with his arms up." Such a shot was "impossible" and "inconsistent with the gunshot wound." Dr. Gonsoulin's testimony was supported by photographic evidence showing the bullet wound, a

post-mortem X-ray image of Dominguez showing the bullet inside the left side of his chest, and the autopsy report. The jury could not rationally have concluded, given this evidence, that Dominguez was shot while facing appellant, rather than while turned relative to appellant. *See Evans*, 202 S.W.3d at 163 & n.16 (evidence "becomes conclusive (and thus cannot be disregarded) when it concerns physical facts that cannot be denied") (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 815 (Tex. 2005)); *Satchell*, 321 S.W.3d at 132. And this evidence supporting appellant's defenses could not rationally be rebutted by the inconsistent testimony of a bystander at a distance viewing what happened through a solar panel at night, as the expert testimony showed.

Gina's testimony also contained numerous internal contradictions and conflicted with her witness statement that she gave to investigating law enforcement officers the night of the shooting. For example, she testified that she had seen a gun before she heard Mrs. Braughton say, "Put the gun down." She later testified, however, that she could not actually see that appellant had a gun and "didn't know what kind of weapon it was exactly, but when [she] heard the shot, [she] knew it was a gun." She testified that she saw Braughton Sr. and Dominguez fighting, but later testified that she did not see any physical fight at all and simply "assume[d] they were fighting because they were just yelling at each other." She also testified that she told investigating officers that the initial verbal altercation

and subsequent physical fight were between appellant and Dominguez, even though the undisputed physical evidence and the testimony of every other witness showed that the physical fight was between Braughton Sr. and Dominguez. Gina told the officers on the night of the shooting that appellant and Dominguez argued regarding the amount of noise made by the motorcycle at night and began shoving each other, at which point appellant "pulled out a gun." That scenario conflicts with not only her own testimony but also with that of every other witness to the shooting.

Moreover, all of Gina's testimony is overshadowed by the fact that she viewed all the events through a screen on her window, a screen that she testified made everything "blurry" and obscured details to the point that one could not determine whether a person on the other side was wearing glasses. Gary Gross, who installed the screen, testified that the screen was designed to "block 90 percent of visible light" and that it would not be possible to "make out what [one was] seeing" through it at night. Even Gina initially agreed that Defendant's Exhibit 8—a photograph taken through her window that is nearly entirely black, with only intermittent areas of dark gray—fairly and accurately depicted what she could see on the night of the shooting, though she later stated that her view was better than that shown in the exhibit.

Considering all of the evidence in the light most favorable to the verdict, the jury could not rationally have believed Gina's testimony that Dominguez was shot while backing away with his hands up. Even assuming that it was possible for Gina to see whether Dominguez had his hands up, the physical evidence shows that it would have been impossible for appellant to shoot Dominguez in the manner that Gina described. While it is hypothetically possible that Dominguez faced appellant but turned his body in the moment immediately before he was shot, there is no evidence that he did so, and juries are not permitted to reach speculative conclusions unsupported by the evidence. *See Elizondo*, 487 S.W.3d at 203 ("[J]uries are not permitted to reach speculative conclusions" or engage in speculation regarding essential facts not in evidence).

Given that the jury could not have believed Gina's account of the shooting and could not contrive its own version untethered from the trial evidence, I would conclude that all of the credible evidence as to how the shooting transpired supports appellant's defensive theories. There was only one scenario given that explains how appellant shot Dominguez that was supported by the evidence and not rendered impossible by the physical evidence: that is the account given by appellant, Braughton Sr., Mrs. Braughton, and neighbor Glen Irving that appellant shot Dominguez as Dominguez purported to reach for a gun. While the jury was free to reject some or all of any witness's testimony, it was not free to speculate or

to reach a conclusion that is irrational in light of all of the evidence. *See id.*; *see also Jackson*, 443 U.S. at 319–20, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 859; *Nelson*, 405 S.W.3d at 122–23.

The majority, however, explains away the credible witness evidence and physical evidence by indulging in its own speculation as to how the jury's verdict might be justified by what was *not* in evidence. It holds that "the jury could have discredited the testimony that Mrs. Braughton called Chris before the fight began—testimony that was undermined by the absence of any phone records demonstrating that it occurred or any data retrieved from any phone found at the scene." Slip Op. at 32. However, the jury was required to consider the evidence that was presented at trial in determining whether the State met its burden of persuasion—the jury was *not* entitled to draw inferences *not* supported by the evidence to support the jury's verdict. Here, the uncontradicted evidence—including testimony from appellant and Mrs. Braughton—indicated that Mrs. Braughton called appellant during the road-rage incident. And regardless of how appellant learned of the conflict, the undisputed evidence demonstrates that appellant did not know Dominguez prior to the confrontation, that appellant came out of the house in close proximity to his family's arrival near their home, and that appellant observed Dominguez physically harming his father at that time.

Likewise, the majority asserts, based on the nature of Braughton Sr.'s injuries, the DNA evidence "indicat[ing] only that Dominguez punched Braughton Sr. once," and Braughton Sr.'s own testimony "that he was punched three times," that the jury could have rationally determined that appellant's use of deadly force was not immediately necessary. *See* Slip Op. at 32–33. But this view of the evidence disregards the fact that appellant saw Dominguez—a man who had military training and was very intoxicated—assault his father outside the family home and in the presence of the rest of the Braughton family. Multiple witnesses testified to the altercation between Braughton Sr. and Dominguez, the DNA evidence showed that Dominguez had struck Braughton Sr., and photographs showed Braughton Sr.'s injuries. The fact that these injuries might have been worse, as the majority argues, is again speculative, contrary to fact, and irrelevant. The fact that appellant saw the assault occur supports his assertion that he acted in defense of a third person.

And the fact that Dominguez did not ultimately have a weapon in his possession is not relevant here. The jury, and this Court, were required to consider whether appellant "reasonably believe[d] the force [wa]s immediately necessary to protect [himself] against the other's use or attempted use of unlawful deadly force"—not whether the threat turned out to be supported or unsupported after the fact. *See* TEX. PENAL CODE ANN. § 9.32; *Smith*, 355 S.W.3d at 145. The only

credible evidence adduced at trial established that Dominguez struck Braughton Sr., verbally threatened appellant when he stepped in to protect his father, and reached for his motorcycle as if reaching for a weapon. Thus, in light of this evidence, the only rational inference supported by the evidence is that appellant believed it was immediately necessary for him to use force against Dominguez. *See* TEX. PENAL CODE ANN. § 9.32; *Smith*, 355 S.W.3d at 145.

By contrast, the State offered no credible evidence that appellant acted with the requisite intent to commit murder. *See* TEX. PENAL CODE ANN. § 19.02(b) (providing that intent is element of murder); *Schroeder*, 123 S.W.3d at 400 ("Murder is a 'result of conduct' offense, which means that the culpable mental state relates to the result of the conduct, i.e., the causing of the death."). The evidence here all demonstrates that appellant acted with the intent to protect himself and his family. Appellant did not know Dominguez or have any interactions with him prior to the confrontation between Dominguez and the Braughtons. Dominguez, and not appellant, was the initial aggressor in the confrontation between Dominguez and the Braughton family. Appellant warned Dominguez prior to shooting, but Dominguez responded with a threat, and appellant fired a single shot. Appellant testified that he aimed at Dominguez's arm, and the physical evidence demonstrates that the bullet in fact hit Dominguez in his armpit. Bannon testified that appellant was "just trying to defend his dad." After

the shooting, appellant remained at the scene and cooperated with the law enforcement investigation. Considering appellant's acts and words, the circumstances surrounding the commission of the crime, and the nature of the wound inflicted on Dominguez, even when viewed in the light most favorable to the jury's finding, the evidence does not support an inference beyond a reasonable doubt that appellant acted with the requisite criminal intent to cause Dominguez's death and that, beyond a reasonable doubt, appellant did *not* act with the intent to defend himself or his family. *See Manrique*, 994 S.W.2d at 649.

In light of all of the evidence, I would hold that no rational juror could have found all essential elements of murder beyond a reasonable doubt *and* also have found against appellant on his defensive theories beyond a reasonable doubt. *See Saxton*, 804 S.W.2d at 914. I would hold that it is irrational to conclude beyond a reasonable doubt based on the totality of the evidence in this case that appellant did not shoot Dominguez in self-defense or in defense of a third person. Therefore, I would hold that legally insufficient evidence supported the jury's rejection of appellant's justification theories.

I would sustain appellant's second issue, and I would render a judgment of acquittal without reaching his first or third issues.

Conclusion

I would reverse the judgment of the trial court, render a judgment of acquittal, and order that appellant be released from custody.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Brown, and Huddle.

Justice Keyes, dissenting.

Publish. TEX. R. APP. P. 47.2(b).